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PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT

by
Howard S. Levie

SAINT LOUIS UNIVERSITY LAW SCHOOL

Prisoner of War! That is the least unfortunate kind of prisoner to be, but it is nevertheless a melancholy state. You are in the power of your enemy. You owe your life to his humanity, and your daily bread to his compassion. You must obey his orders, go where he tells you, stay where you are bid, await his pleasure, possess your soul in patience.

WINSTON S. CHURCHILL
A Roving Commission 259 (1930)

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FOREWORD

Since the founding of the Naval War College in 1884, the study of International Law has been an important part of its curriculum. From 1894 to 1900 the College compiled and printed, for a limited distribution, a number of lectures on International Law together with the situations studied. In 1901, the first formal volume of the "Blue Book" series was published. Thereafter, the series continued on an annual basis until the mid-1960s.

With the establishment of a revised resident curriculum at the Naval War College, Richard L. Lillich, Professor of Law at the University of Virginia Law School and former (1968-1969) holder of the Naval War College Stockton Chair of International Law, conducted a comprehensive reappraisal of the need for and value of the "Blue Book" series. As a result of this study, the College has decided to reinstitute its series in order to publish timely treatises and articles concerning important areas of International Law.

With this background, it is my pleasure to write the foreword to this volume, the fifty-ninth of the series, by Professor Howard S. Levie, recently of the Saint Louis University School of Law, who occupied the Charles H. Stockton Chair of International Law at the Naval War College during the 1971-1972 academic year. In light of the recent experiences of the American prisoners of war in Vietnam, Professor Levie's excellent study of the Geneva Convention Relative to the Treatment of Prisoners of War could not be more appropriate. The development of a total understanding of the rules of law which govern the treatment of prisoners of war is essential in order to promote those principles of humanitarianism necessary to regulate an all too often imperfect world.

The opinions expressed in this volume are those of the author and are not necessarily those of the United States Navy or the Naval War College.

JAMES B. STOCKDALE
Vice Admiral, U.S. Navy
President

PREFACE

Pope Pius XII once said:

> The treatment of prisoners of war and of the civilian population of occupied areas is the most certain measure and index of the civilization of a people and of a nation.

Perhaps in recognition of this "index of civilization," the representatives of most of the members of the then world community of nations met in Geneva in 1949 and drafted four conventions for the protection of war victims, conventions which, as of 1 June, 1977, had been ratified or adhered to by 143 nations. (See Appendix B.) The third one of those conventions, the 1949 *Geneva Convention Relative to the Treatment of Prisoners of War* is the subject of this monograph. It will be noted that the title of this volume specifically limits the discussion to the status of prisoners of war in international armed conflict. Cognate problems arising in cases of internal conflict have so proliferated in recent years as to make that a subject requiring and warranting a study limited exclusively to that field. This task I leave to others who have already produced a number of articles on various aspects of the problem.

It will undoubtedly be said by some that the international law of the subject discussed herein, and hence this volume, is concerned with a situation which will never recur, that the era of large-scale long drawn-out wars has ended, that the arrival of the atomic age has made obsolete the rules of international law contained in such documents as the four 1949 Geneva Conventions for the Protection of War Victims. Unfortunately, there is just no reason to believe that, however many "pacts," "charters," "codes," or "conventions" are entered into by the nations of the world, this will have the effect of eliminating armed conflict as a method of settling disputes between nations. And the 1949 Geneva Conventions are properly geared to govern "little" wars, such as Korea, the Middle East, India-Pakistan, China-India, Vietnam, etc., etc., as well as "big" wars, such as World War I and World War II. While the total elimination of international armed conflict as a method of settling disputes between nations is certainly an end devoutly to be sought, I am afraid that I am too much of a pragmatist to believe that such an end is just around the next corner. However, should the millennium actually arrive in the near future, it is hoped that this volume will still have some historical value as an indication of the status of an important segment of inter-

national law at the very moment when a major change in human nature rendered it archaic.

The International Committee of the Red Cross (ICRC), which may well be considered to be both the midwife and the guardian of the 1949 Conventions, has frequently pointed out that it cannot interpret those Conventions, that this is a power residing exclusively in the Contracting Parties. Nevertheless, there are few publications of the ICRC which do not discuss and interpret some facet of the Conventions. Similarly, I do not purport to speak with an authoritative voice when I present my views on various aspects of the 1949 Prisoner-of-War Convention; but it would be naive, indeed, to assume that I do not believe that the views expressed herein with respect to the meaning and intent of the provisions discussed represent the proper interpretations thereof. In this regard, it should be noted that occasions will be found in which my views are not in accord with the consensus of writings by representatives of the ICRC. When this occurs it may undoubtedly be ascribed to the fact that the latter are uniformly motivated by idealistic concepts, as representatives of that great humanitarian organization should and must be, while I have, in some instances, felt it more appropriate to present what I consider to be a practical, workable interpretation which would be acceptable to nations at war.

Unquestionably, the comments and point of view of any writer will, to some extent and despite all efforts to the contrary, be colored by his personal experiences and by his nationality with the resultant more extensive availability of materials originating in his own country and in his own language for empirical research. A conscious effort has been made to avoid such a chameleonlike result. I have attempted to present the subject from as international and multinational a point of view as possible. Thus, examples have been cited from the practice of as many and as varied a group of countries as could be found. If it appears that a good deal of reliance is placed upon practices followed by the United States and the United Kingdom, and contemplated by those two countries in the event of any future international armed conflict in which they are involved, this is not because of any chauvinism, any feeling that such practices are superior to those of other countries, but only because those two countries appear to have made information concerning their practices, past and future, more readily available to the researcher. For example, in the Foreword to Volume XV of the *Law Reports of Trials of War Criminals,* prepared and published by the United Nations War Crimes Commission, Lord Wright, the Chairman of the Commission, lists the number of cases received from each country (1,333 out of 1,911 were from the United States or United Kingdom; none was received from any country now Communist except Poland) and points out that all nations which were

members of the Commission were invited to forward records of the trials conducted by them, but that many did not do so; and both the United States and the United Kingdom have, since the end of World War II, issued well-documented military manuals, something that appears to be the exception rather than the rule. Moreover, this book was written in the United States, most of the research was done there (although considerable use was made of the facilities of the Library of the Peace Palace in The Hague), United States materials were the most readily available, and my personal experiences in this field have been largely, though not exclusively, U.S.-oriented. Despite these shortcomings, it is believed that the reader will find a fairly well balanced presentation with justifications advanced, in appropriate instances, for German practices during World War II and, more rarely, even for some Japanese practices during that holocaust. If, at times, exceptions appear to be taken to policies adopted and practices followed in this area by a number of countries of Communist persuasion, that is because, unfortunately, these countries have almost uniformly demonstrated again and again, both during World War II and since, that where it suits their purposes, they will arbitrarily interpret a Convention in their own interests and against the interests of the prisoners of war whom they hold, or even disregard the Convention in its entirety.

This volume is not intended to be a mere update or supplement to the work so ably done by Dr. Jean S. Pictet, Dr. Jean de Preux, and their collaborators, in the production of the ICRC's *Commentary* on the Prisoner-of-War Convention. It is believed that it will be found that both the format and the critical content differ substantially from those of the *Commentary*. As regards the format, it must be noted that in drafting the 1949 Convention the members of the various preliminary conferences called by the ICRC which did the spadework, and the 1949 Geneva Diplomatic Conference, which brought the 1949 Geneva Prisoner-of-War Convention to its final accepted form, attempted — with only partial success — to adopt a functional approach and to proceed, section by section, and chapter by chapter, from one area of interest to another. I say that they were only partially successful because so many subjects are actually dealt with in numerous, scattered articles. (For example, rules relating to the food of prisoners of war may be found in Articles 15, 20, 26, 44, 45, and 51.) It appeared to me that in order to be most useful to the people actually concerned with prisoner-of-war problems in the field in time of international armed conflict, as well as the representatives of the Protecting Powers, the legal advisers of the Foreign Offices and War Ministries of the belligerent Powers, and the academic researchers, the best method of presentation would be one which would follow the prisoner of war from the moment of his capture to his ultimate release

and repatriation, with elaboration on certain major problems. Accordingly, the format adopted is on a completely functional basis, avoiding to the maximum extent possible the article-by-article approach found in the *Commentary*, bringing together and correlating all of the numerous and scattered provisions of the 1949 Convention which are concerned with any particular facet of the problem. (An exception to this format will be found in Chapter I, which deals with most of the so-called Common Articles — articles which appear in all four of the 1949 Geneva Conventions. The discussion of these articles necessarily falls outside of the general pattern, as these provisions are usually unrelated to any other provisions and must, therefore, be discussed individually.)

As regards the critical content, the users of this volume will, I fear, find only faint traces of the optimistic idealism which characterizes the *Commentary*. There the authors were, and properly so, motivated by the pure humanitarianism which constitutes the *raison d'être* of the ICRC. In numerous instances they indubitably interpret the provisions of the Convention as they would like to see them interpreted and applied by the adverse belligerent Parties. Here, I have endeavored to provide both hard data and a personal estimate as to what the 1949 Diplomatic Conference meant when it drafted the various provisions of the Prisoner-of-War Convention, what States meant when they ratified or adhered to it, what States have done when it has become necessary for them to apply the Convention, and what they may be expected to do if it becomes necessary for them to apply it in the future. In other words, this book endeavors to present the Convention pragmatically, rather than idealistically. Of course, where the State practice which is available indicates blatant disregard and violation of the Convention, rather than disputed interpretation, this is clearly stated and is not considered as a precedent-making interpretation.

I have been fortunate in that I have had a number of opportunities to observe at first hand many facets of operations relating to prisoners of war during the course of World War II, Korea, and the last India-Pakistan conflict. (I spent a full day in the prisoner-of-war camp at Koje-do, in Korea, just a few weeks before that name became famous throughout the world!) Unfortunately, I cannot say the same with respect to the much more recent prisoner-of-war operations which occurred during the hostilities in Vietnam. The reluctance of the North Vietnamese (like that earlier of the North Koreans and Chinese Communists) to provide any hard information with respect to their treatment of prisoners of war is well known.

In 1973, after a number of preliminary conferences of various groups of experts, the ICRC produced two Draft Additional Protocols to the 1949 Geneva Conventions to serve as the working documents

for a Diplomatic Conference called by the Swiss Federal Council to meet in Geneva in February 1974. That Diplomatic Conference was considerably less successful than had been hoped, with the result that it has since met in 1975 and 1976, and will meet again in 1977. Only the First Draft Additional Protocol, relating to international armed conflict, is relevant to the subject matter of this volume and only a very few articles thereof will have any impact on the law applicable to the treatment of prisoners of war. Where the committee decisions reached on those articles through the 1976 session were reached either by consensus or, where votes were taken, by close to unanimity, it has been assumed that they will be included in the Protocol that will presumably be adopted by the 1977 session of the Diplomatic Conference. Appropriate references to the relevant actions of the 1974, 1975, and 1976 sessions of the Diplomatic Conference will be found in the text and footnotes.

For the convenience of the reader, the entire 1949 Geneva Convention relative to the Protection of Prisoners of War is reproduced as Appendix A, beginning at p. 431. It was felt that in most cases it would only be confusing to the reader to specify the numbering of the articles used in the Stockholm and Working Drafts of the Convention when discussing the evolution of a provision. For those who desire to trace such evolution in detail, the changes in such numbering from the 1929 Convention, to the draft presented by the ICRC to the 1948 Stockholm Conference, to the Working Draft (the text approved at Stockholm), to the Convention adopted by the 1949 Diplomatic Conference are easily found by reference to the "Index to Articles" located in Volume III of the *Final Record of the Diplomatic Conference of Geneva of 1949* (at 217).

I have already presented my views on various aspects of prisoner-of-war problems in a number of articles. I am indebted to the editors of the *American Journal of International Law* for permission to use "Prisoners of War and the Protecting Power," 55 *A.J.I.L.* 374 (1961); "Penal Sanctions for Maltreatment of Prisoners of War," 56 *A.J.I.L.* 433 (1962); "The Employment of Prisoners of War," 57 *A.J.I.L.* 318 (1963); and "International Law Aspects of Repatriation of Prisoners of War during Hostilities: a Reply," 67 *A.J.I.L.* 693 (1973); and to the editors of the *Boston University Law Review* for permission to use "Maltreatment of Prisoners of War in Vietnam," 48 *B.L.U. Rev.* 323 (1968). Acknowledgment is also due to the Association of the Bar of the City of New York for permission to use relevant portions of "Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals during Armed Conflict," which was the Working Paper for the XIVth Hammarskjold Forum, *When Battle Rages, How Can Law Protect?* (John Carey, ed.)

I must express my appreciation for the assistance rendered to me by George J. Skupnik and John J. James, each of whom served as a research assistant during his senior year at the Saint Louis University Law School, performing many arduous, and often uninteresting tasks; Commander Leo J. Coughlin, Jr., JAGC, USN, Commander J. Ashley Roach, JAGC, USN, and Commander Dennis McCoy, JAGC, USN, successively, Head, International Law Division, Center for Continuing Education, Naval War College, each of whom, as editors of the Blue Books, offered continuous encouragement, meanwhile extracting the manuscript from me chapter by chapter; Ms. Pamela Scholl and other secretaries in the Saint Louis University Law School who typed the first clean draft of each chapter from the dirty one produced by my own typewriter and pencil; Mrs. Mildred Imondi, of the Naval War College, who produced the final, correlated draft of the text and footnotes; Mrs. Vivian M. Hutchins who gave the manuscript its last thorough review; Waldemar A. Solf and Harry H. Almond, who read the manuscript in final form and gave valuable critical appraisals; and last, but certainly not least, my wife, who each night read quietly despite the clatter of my portable. I am also indebted to the Government of Pakistan, and particularly to then Ambassador Sultan Mohammad Khan and Minister S. I. Riza of the Pakistani Embassy in Washington, for the opportunity to view at first hand the 1973–1974 repatriation of Pakistani prisoners of war from India and to interview a representative group of repatriated prisoners of war, selected at random, concerning their treatment while in prisoner-of-war camps in India after the December 1971 armed conflict between those two countries.

While this volume is published under the auspices of the United States Naval War College as part of its "Blue Book" series, it does not purport to state United States Government policy and it definitely does not have the imprimatur of the Department of Defense or of any of its component services. It is exclusively the opinion of the author as to what the law relating to prisoners of war is, what the practice of States has been and may be expected to be with respect to this problem, and, in some instances, what it is believed that the law ought to be in the light of humanitarian considerations.

HOWARD S. LEVIE

St. Louis
September 1976

ADDENDUM TO THE PREFACE

The fourth session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted a Final Act at Geneva on 10 June 1977. While the final preparation and the signing of the text of the Protocol Relating to the Protection of the Victims of International Armed Conflicts (Protocol I) as actually adopted at Geneva is not scheduled to take place until 12 December 1977, in the belief that the work of the Diplomatic Conference represents an important milestone in the law of international armed conflict and that many of the provisions adopted by it will under any circumstances one day be a part of the general international law of war, I have updated all references to the work of the Diplomatic Conference to include its final 1977 decisions. A caveat —as there is as yet no official text, I have been compelled to use an unofficial draft which may vary to some extent from the text actually signed.

HOWARD S. LEVIE

Newport
July 1977

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4. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Convention): 6 *U.S.T.* 3516; T.I.A.S. No. 3365; 75 *U.N.T.S.* 287; 1 *Final Record* 297; 50 *A.J.I.L.* 724; 157 *BFSP* 355; 1 Friedman 641; 47 NWC 170; Schindler & Toman 417.

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CHAPTER I

PRELIMINARY PROBLEMS

A. INTRODUCTORY

The events of almost six years of armed conflict during World War II clearly demonstrated the deficiencies which existed in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War,[1] the treaty by which most of the belligerents in that conflict were bound in their treatment of prisoners of war.[2] Almost before that conflict had ended, the International Committee of the Red Cross (the ICRC)[3] began a series of conferences of technical experts, government experts, national Red Cross officials, and other specialists, in order to obtain a cross section of views as to what was needed to bring the law for the protection of prisoners of war into the second half of the twentieth century. By 1948 a draft convention, with a number of innovations, had been prepared and it was submitted to the XVIIth International Red Cross Conference which met in Stockholm in August of that year.[4] The ICRC draft was modified and approved by the Red

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[1] Citations for all treaties and cases referred to in the text or notes will be found in the appropriate table, beginning at pp. LVII and LXV, respectively. Citations for, and the full names of, all works to which reference is made will be found in the Table of Abbreviations, Articles, Books and Documents, beginning at p. XIX.

[2] The Soviet Union and Japan were not Parties to the 1929 Geneva Prisoner-of-War Convention. Japan signed that Convention but did not ratify it. The Soviet Union did not participate in the drafting of the Convention and never adhered to it.

[3] The International Committee of the Red Cross (ICRC) is a century-old humanitarian organization composed entirely of Swiss citizens which maintains a strictly neutral status in all armed conflicts, offering its services equally to both sides. Since 1864 it has been the motivating force behind the series of humanitarian "Geneva" Conventions. *See* note 276 *infra*. Its status and activities in wartime are officially recognized and formalized in the 1949 Geneva Conventions, note 4 *infra*. At its behest a Diplomatic Conference had been called by the Swiss Federal Council to meet early in 1940 to revise the 1929 Convention, but the outbreak of hostilities in September 1939 had prevented this Conference from convening.

[4] Actually, there were four draft revised or new conventions prepared by the ICRC and presented to the Red Cross Conference. *See Draft Revised Conventions* 4, 34, 51, & 153. The Prisoner-of-War Convention was the third of the group and is therefore sometimes referred to as the "*Third Convention.*" The four conventions are known collectively as the 1949 *Geneva Conventions for the Protection of War Victims.*

Cross Conference.[5] The Swiss Federal Council had already instituted action for the convening of a Diplomatic Conference to consider the matter and that Conference met in Geneva in April 1949. Using the Stockholm approved draft as the working document, after almost four months of discussions, negotiations, compromises, agreements, and disagreements, the Diplomatic Conference completed the drafting of, among others, the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.[6]

Of course, the law relating to prisoners of war began to develop long before the drafting of the two treaties just mentioned. A complete and detailed presentation of the development of custom and law applicable to the prisoner of war over the period of the recorded history of mankind is beyond the scope and purpose of this study. Our concern is with the status of the prisoner of war under international law *today*, and, of even more importance, *tomorrow*. However, as is true of the study of most areas of contemporary life, some knowledge of the pertinent history of the subject under discussion will serve not only to ensure a better understanding of present-day law and procedures, but also to furnish a basis for the proper interpretation of some of the applicable rules which have had their origin in the need to solve a particular problem in time past. Accordingly, it is considered appropriate to lay a foundation for the discussion in depth which follows by beginning with what is admittedly an extremely abbreviated history of the treatment of prisoners of war over the ages.[7]

B. HISTORICAL

In the early days of recorded history the concept of the "prisoner of war" was completely unknown. It necessarily follows that there was

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[5] Revised Draft Conventions 5.

[6] *See* Appendix A. Inasmuch as the complete Convention is reproduced in Appendix A, when specific articles are cited or quoted they will not be footnoted. Fifty-nine Governments participated in the Diplomatic Conference. Sixty-four (including the Holy See) signed the Conventions at the conclusion of the Conference. For a complete list of the subsequent ratifications and adherences, up to 1 June 1977, see Appendix B. In this study the 1949 Prisoner-of-War Convention will normally be referred to as "the Convention" or "the 1949 Convention."

[7] The three most comprehensive recent histories in English of the treatment of prisoners of war over the ages are, unfortunately, all in manuscript form. They are, in the chronological order of their preparation: Vizzard, Prisoner of War Policy in Relation to Changing Concepts of War (Ph.D. thesis, University of California, 1961) (Vizzard, Policy); United States Army, Office of the Provost Marshal General, A Review of United States Policy on Treatment of Prisoners of War (1968) (*PMG Review*); and Grady, The Evolution of Ethical and Legal Concern for the Prisoner of War (Dissertation, Graduate School of Theology, The Catholic University of America, 1970) (Grady, Evolution). The author is indebted to Mr. David Ellis, then of the Office of the Provost Marshal General, Department of the Army, for making copies of the latter two available. These three manuscripts are the source of much of the material which appears in this section.

no such thing as a set of customs or rules protecting individuals, either combatant or noncombatant, man, woman, or child, taken captive in battle. They were, in fact, quickly slaughtered; and the victor well knew that this would be his fate, too, should he be less fortunate on the occasion of the next battle. The Old Testament is replete with stories of the slaughter of persons captured in war, both soldier and civilian;[8] and the practice was one which was, and long continued to be, followed by all nations. During this period, and for many centuries thereafter, the captive taken in war became the private property of his captor, who exercised the power of life or death over him.

As early as several millennia B.C., Egyptian and Mesopotamian civilizations began to make slaves of prisoners of war rather than killing them. This change in practice was based on economic, rather than humanitarian, considerations. The agricultural economy which was just beginning to develop in that area required manpower to work in the fields; and prisoners of war as slaves constituted such manpower. However, the custom was apparently not widely adopted by other contemporary or later civilizations until the advent of the Roman era.

When Greece became the center of Mediterranean civilization, there was no improvement in the lot of the prisoner of war, unless he was a Greek of another City-State, in which event he could be ransomed. In a few cases there were exchanges of prisoners of war captured by the two sides. In general, however, the fate of most captives of this period was mutilation and death, only a few being enslaved by their captors or sold into slavery elsewhere in Greece.[9]

The Romans at first followed in the footsteps of their predecessors. However, by the beginning of the Christian era both exchanges of prisoners of war between opposing generals and ransoming had become quite common. Later, as the Romans—like the Egyptians 2,000 or more years earlier—came to realize the economic value of the prisoner of war, enslavement became the prevailing practice.[10] In the course of time the genius of the Roman law even evolved rules controlling some aspects of the treatment of these slaves; for example, it prohibited the Roman master from the wanton killing of his slave.

Generally speaking, during this early period of recorded history the slaughter of prisoners of war was also the general practice in Asia. At certain periods there were exceptions in a few Asiatic countries. Thus, both Sun Tzu's *The Art of War*, which probably dates from about the fourth century B.C., and the *Manu Sriti*, a Sanskrit treatise

[8] *See, e.g.*, Numbers 31:7–8, 17; Deuteronomy 3:6, 20:13–17; Joshua 6:21, 10:35, 37, 39, 11:11; I Samuel 15:3. *But see* II Kings 6:22–23.

[9] 2 Phillipson, *The International Law and Custom of Ancient Greece and Rome* 251–52, 257–63 (1911).

[10] *Ibid.*, 253–57, 263–66; Davis, Prisoner of War 523. *But see* Creasy, *Decisive Battles of the World* 126 (describing German reciprocal killing of Roman prisoners of war in A.D. 9 during Arminius' victory over Vars' legions).

on law which probably dates from the period between 200 B.C. and A.D. 200, forbade the slaying of prisoners of war. Absorption into one's own army, enslavement, or ransom were the alternatives.

With the fall of the Roman Empire, Europe entered the Dark Ages. Neither combatants nor noncombatants had any rights. During this period the Catholic Church engaged in the ransoming of Christian prisoners of war; and while the Church made a number of efforts to improve the lot of the prisoner of war, these efforts related only to warring members of the Church and non-Catholic prisoners of war could expect no help from this source.

The era of chivalry saw a definite code evolve under which captured knights were well treated and were held for ransom. They might even be released on parole to raise the ransom,[11] but this code applied only to the knight, not to the foot soldier. For him there was no system of ransom; and when captured he could expect to be treated with historic ruthlessness. Massacres and enslavement of prisoners of war were still the order of the day during the Crusades. The Crusaders massacred all captured Saracens and enslaved all captured Eastern Christians;[12] while the Saracens, with equal ferocity, massacred all captured Christians.[13]

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[11] Keen, *The Laws of War in the Late Middle Ages* 156–85 (1965). Richard the Lion-Hearted of England was thus released before his full ransom had been paid to Emperor Henry VI.

[12] Although the Third Lateran Concilium (1179) is often stated to have made a pronouncement against the enslavement of Christian prisoners of war (see, for example, Marin, *Recueil* 655), this was actually limited to shipwrecked Christians (5 Hefele, Histoire des Conciles 1105) and apparently had little effect on actual practice.

[13] The uniformity of the practice in this early era is attested to by the following statement from Khadduri, *War and Peace* (at 126–27): "The practice of taking prisoners of war as part of the spoil is very old and goes back to antiquity. The Persians treated their captives with relentless cruelty: they were blinded, tortured, and finally killed or crucified. The Hebraic rule was no less severe than Persian practice. The Muslims, regarding captives also as part of the spoil, often treated them no less cruelly than their predecessors." Actually, the Koran provided that captured non-Muslims were to be held as prisoners of war during the continuance of hostilities and "[t]hen either release them as a favor, or in return for ransom." *Quran*, 47:4 (M. Z. Khan trans., 1971). In al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* 190, the author quotes a more popular version of this Koranic statement and interprets it to mean that "the Islamic state has the choice only between two alternatives; either to set free the prisoners of war gratuitously or to claim ransom. The verse unequivocally does not entitle the Muslims to enslave their prisoners of war. . . ." He then goes on to argue that a policy of enslavement could only be justified as a sanction by way of retaliation "and not as a right *ab initio*." *Ibid.*, 190–91. *But see* Mahmud, *Muslim Conduct of State* 74–76. By the thirteenth century the Muslims had developed rules of war which, at least, prohibited the mutilation of prisoners of war. Marin, *Recueil* 656–57.

The breakdown of feudalism, the increased use of mercenaries, and the rise of nationalism, all of which occurred during the Renaissance, contributed to an evolution in fundamental concepts which began to make its appearance during the seventeenth century.[14] (The religious wars of the Reformation were the exception, continuing the traditional brutal treatment and slaughter of prisoners of war.) By the end of the Thirty Years' War (1648), a prisoner of war had come to be considered as being in the custody of the enemy State, rather than of the individual captor. There was by then a better than even chance that he would not be killed or enslaved, but he still had little or no protection against other types of maltreatment. This basic change in concept did, however, serve as a foundation upon which the principle of humanitarian treatment of prisoners of war could be erected.[15] It remained for Montesquieu, in his *Esprit des lois,*[16] and Rousseau, in his *Contrat social,*[17] to do the theoretical work, and for events emanating from the American and French Revolutions to lead to the practical changes which form the basis for the modern treatment of prisoners of war.[18]

The 1785 Treaty of Amity and Commerce between Prussia and the United States contained a provision (Article XXIV) which probably constituted the first international attempt to provide in time of peace for the protection of prisoners of war in the event that the then friend-

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[14] It was during this period that the great classical writers (among whom were Vitoria, Suarez, Gentilis, and Grotius) made their tremendous contributions to international law, and particularly to the law of war. *See, e.g.,* Grotius, *War and Peace,* Book III, Ch. VII.

[15] Davis, Prisoner of War 525 & 540; Flory, *Prisoners of War* 158–60. Article LXIII of the *Treaty of Westphalia* (Münster, 30 January 1648) provided for the release of all prisoners of war by both sides without the payment of ransom. So also did Article XIV of the *Treaty of Adrianople* (1829). During the eighteenth and nineteenth centuries the practice of exchanging prisoners of war, both during and after the cessation of hostilities, became firmly established as a norm of international law.

[16] Published in 1748. Montesquieu asserted that the only right that the law of war gave over prisoners of war was to secure them in such a way that they could not further participate in the hostilities.

[17] Published in 1762. Rousseau advanced the theory that war was a relationship between States and that individuals were enemies only through accident and as soldiers.

[18] The following pertinent statement appears in Draper, *Recueil,* at 101: "The 18th century evolved the important idea that captivity was a device whereby the prisoner [of war] was to be prevented from returning to his own force and conducting the fight again. As a corollary to this idea it came to be accepted that the prisoner [of war] was not a criminal but a man pursuing an honourable calling who had had the misfortune to be captured. The practical implication of this was that the prisoner [of war] should not be put in irons and thrown into a penal establishment with the local convicts." To the same effect, see 2 Lauterpacht–Oppenheim 367–68.

ly relations between the two countries should be disturbed by war.[19] Considering the lack of existing precedent at the time the Treaty was drafted, the provisions designed "to prevent the destruction of prisoners of war" are amazing in their breadth and scope. Seven years later, in 1792, the French National Assembly enacted a decree which attempted unilaterally to establish a formal code of humanitarian rules governing the treatment of prisoners of war.[20] It proved to be in advance of its time,[21] but the rules which it contained have since been incorporated into the various conventions for the protection of prisoners of war which were drafted more than a century later and which have been widely accepted by the nations of the world.

Despite the difficulties encountered during the Napoleonic Wars,[22]

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[19] Substantially the same provision was contained in a new treaty between the same nations which was entered into in 1799. This treaty lapsed in 1810. It was revived by Article XII of the *Treaty of Commerce and Navigation* of 1 May 1828. This latter remained in force for almost a century but was not revived after World War I. A very similar provision may be found in Article XXII of the *Treaty of Guadalupe Hidalgo between the United States and Mexico*, which was signed in 1848. Even the 1805 *Treaty of Peace and Amity between the United States and Tripoli* and the 1816 *Treaty of Peace and Amity between the United States and Algiers* contained provisions for the benefit of prisoners of war.

[20] *Décret rendu par l'Assemblée nationale le 4 mai 1792 concernant les militaires faits prisonniers de guerre* (Decree of 4 May 1792, of the French National Assembly, 1 DeClercq, *Recueil des traités de la France* 217. The decree read in part as follows (transl. mine):

1. Prisoners of war are under the safeguard and protection of the [French] nation.

2. All cruel acts, violence or insults committed against a prisoner of war shall be punished as if committed against a French citizen.

3. Prisoners of war shall be transported in the rear of the army to special places which the commanding generals shall have designated.

The skeptic might be inclined to ascribe to this action of the French Revolutionary legislature the same motives which impelled the Chinese Communists to institute their so-called Lenient Policy towards United Nations Command prisoners of war during the Korean hostilities. U.K., *Treatment*. 31.

[21] It is, indeed, a paradox that one of the worst war crimes committed against prisoners of war in modern times, prior to World War II, was the killing at Jaffa in 1799, by Napoleon Bonaparte (then a general serving under the French Directory), of more than 3,500 Arab prisoners of war for whom he was unable to spare a guard from his already understrength army. *British Manual* para. 137 n.1. (Concerning a modern massacre of prisoners of war, smaller in total numbers, but of similar inhumanity, see Whiting, *Massacre at Malmédy* 45–46 & 52–54.) Napoleon is also charged with having "destroyed the old exchange system, which has never been fully restored." Laws, *Exchange* 604–05. *See also*, Lewis, *Napoleon* 66–82.

[22] Even at this early date the treatment of prisoners of war had become a subject for legislative investigations, which resulted in findings of exemplary treatment of prisoners of war by one's own country and unprecedented cruelty in the treatment of prisoners of war by the enemy. United Kingdom, Foreign Office, *Report of the Committee of the House of Commons relative to the Treatment of Prisoners of War* (1798).

the treatment of prisoners of war continued to improve.[23] Obviously, the nations of Europe and the New World were slowly but surely arriving at the realization that the mutual maltreatment of prisoners of war was an anachronism which had no place in nineteenth-century civilization. An opinion of the King's Advocate, written in 1832, clearly demonstrates the extent to which prisoners of war had gained the right of protection, and the sanctions which, it was suggested, nations were prepared to take to ensure that such protection was forthcoming.[24] He stated:

> . . . cases may possibly occur in which the treatment of Prisoners of War by a nation may be so barbarous and inhuman as to call upon other powers to make common cause against it, and to take such measures as may be necessary to compel it to abandon such practice, and to conform itself to the more lenient exercise of the rights of war, adopted by other States . . . .[25]

The advent of the American Civil War (1861–65) created prisoner-of-war problems which probably exceeded any previously known.[26] A system of exchange during the course of hostilities was agreed upon but did not operate successfully.[27] A Code drafted by Dr. Francis Lieber for the use of the Union army[28] contained a number of articles dealing with prisoners of war,[29] but these can scarcely be said to have

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[23] Although there is some question as to whether it was ever legally in force, the extensive provisions of the *Cartel for the Exchange of Prisoners of War between Great Britain and the United States of America*, signed at Washington, on 12 May 1813, indicate the great breadth of the rules which had evolved for the protection of prisoners of war by the beginning of the nineteenth century. For a discussion of this agreement and of one of 1820 between Colombia and Spain, see Basdevant, *Deux conventions* 5. *See also* Anon., A Treaty for the Regulation of War in 1820, 13 *I.R.R.C.* 52.

[24] Unfortunately, although, as we shall see (p. 26 *infra*), the 1949 Convention specifically provides that every Party undertakes to "ensure" respect for the agreed-upon rules for the protection of prisoners of war, third-party States are extremely reluctant to intervene even in cases of the most blatant violations.

[25] 3 McNair (ed.), *International Law Opinions* 119 (1956).

[26] *See* Laska & Smith, 'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865, 68 *Mil. L. Rev.* 77. For a fictional, but substantially factual, presentation of the treatment, or maltreatment, of prisoners of war during this conflict, see Kantor, *Andersonville*.

[27] *See* p. 398 *infra*.

[28] United States Army, General Orders No. 100, 24 April 1863, *Instructions for the Government of the Armies of the United States in the Field*, more generally known as the "Lieber Code." For comments on these *Instructions*, *see* Marin, *Recueil* 662–64; Coursier, Lieber 377; Baxter, Codification 171. Article 56 of the *Instructions* provided:

> A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel punishment, want of food, by mutilation, death, or any other barbarity.

[29] Articles 56, 59, 71–80, and 105–110.

done more than to assure them of some basic protection. Moreover, while this Code had been prepared by Dr. Lieber, and it undoubtedly benefited from his prestige, it was, nevertheless, simply a unilateral act of the U. S. Government and it had no international status—except that it did provide an important source for the drafting of subsequent codes on the subject.

The balance of the nineteenth century saw a number of efforts, both unofficial and official, to codify the law of war, including that relating to prisoners of war. The Swiss international jurist, Bluntschli, produced two significant works on the subject at this time;[30] and Field, an American, made a major contribution to the growing literature on the subject shortly thereafter,[31] Then in 1874 an international conference called by the Tsar of Russia convened in Brussels and made the first attempt by governments to codify the law of war. While the Declaration of Brussels[32] which emanated from that conference never entered into effect as an international agreement, it unquestionably had a very considerable influence on subsequent governmental codification efforts which were successful. And finally, in 1880 the Institute of International Law produced the Oxford Manual,[33] another influential, but unofficial, codification of the law of war.

These numerous attempts by diplomats and international jurists to codify the law of war, including the rules relating to the treatment of prisoners of war, not only constituted important source material, but also contributed greatly to the international climate which made possible the successful drafting of the Regulations Respecting the Laws and Customs of War on Land attached to the Second Hague Convention of 1899. This was the first effective multilateral codification of the law of war. Its impact on the rules governing the treatment of prisoners of war and subsequent codifications on that subject was immeasurable.[34]

The Russo-Japanese War (1904–05) was the only major conflict to

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[30] Bluntschli, *Das moderne Kriegsrecht*, based on his friend Lieber's works, and *Das moderne Völkerrecht.*

[31] Field, *Draft Outlines of an International Code.* Influenced, no doubt, by events in the American Civil War (1861–65), Field was probably somewhat less humanitarian than Bluntschli.

[32] Articles 9–11 and 23–34 of the Declaration dealt with prisoners of war. Although the Declaration did not become effective, in the Russo-Turkish War (1877–78), the Tsar ordered that Russian troops comply with its provision and in July 1877 he issued a "Regulation concerning prisoners of war" which was extremely humane. Scott, *Resolutions* 17, 19.

[33] Articles 21–23 and 61–78 of the Manual dealt with prisoners of war.

[34] The foregoing discussion should not be construed as in any manner denigrating from the affirmative effect of the successful drafting and ratification of the 1864 *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.* This was, of course, the first of the series of Geneva humanitarian conventions. (*See* note 276 *infra.*)

occur while the Second Hague Convention of 1899 and its Regulations were in effect.[35] They were soon replaced by the Fourth Hague Convention of 1907[36] and by the Regulations attached to that Convention.[37] It was this Convention which was in effect during World War I,[38] and practically all of the belligerents found the prisoner-of-war provisions to be inadequate. As a result, the prisoner-of-war provisions of those Regulations were supplemented by a great many special multilateral and bilateral agreements which were entered into during the course of the conflict.[39] This clear evidence of its inadequacy[40] enabled the ICRC to promote and secure the drafting of a new agreement dealing exclusively with prisoners of war, which was completed and signed in Geneva in July 1929.[41] When World War II commenced there were more than 40 Parties to this Convention.[42] As had been realized,[43] its application during that conflict demonstrated once again that a number of material provisions for the adequate protection of prisoners of

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[35] Despite some partisan claims (*see*, for example, Takahashi, *Russo-Japanese War* 102), the treatment of prisoners of war in this conflict was probably almost exemplary on both sides. Franklin, *Protection* 78–79; Ariga, *Guerre russo-japonaise* 93–130.

[36] Article 4 of this Convention provided that it replaced the cognate 1899 Convention as between the Contracting Parties.

[37] There were only very minor differences between the prisoner-of-war provisions of the Regulations attached to the two Conventions. For a detailed discussion of the law and practice of this era, see DuPayrat, *Le prisonnier de guerre dans la guerre continentale.*

[38] While it had a *si omnes* (general participation) clause, and at least one of the belligerents (Serbia) was not a Party to the Convention, all of the belligerent Parties apparently accepted it as being in force. 2 Lauterpacht–Oppenheim 234.

[39] *See, e.g.*, the *Agreement between Great Britain and Germany concerning Combatant and Civilian Prisoners of War*, executed at The Hague, 2 July 1917; *Agreement between the British and German Governments concerning Combatant Prisoners of War and Civilians*, 14 July 1918; the *Final Act of the Conference of Copenhagen*, executed by Austria-Hungary, Germany, Rumania, Turkey, and Russia on 2 November 1917; the *Agreement between the British and Turkish Governments respecting Prisoners of War and Civilians*, executed at Bern on 28 December 1917; the *Agreement between France and Germany concerning Prisoners of War*, executed at Bern on 26 April 1918; and the *Agreement between the United States of America and Germany concerning Prisoners of War, Sanitary Personnel, and Civilians*, executed at Bern on 11 November 1918.

[40] Once again the momentum for improvement provided by international jurists should not be overlooked or underestimated. *See, e.g.*, Phillimore & Bellot 47; and Phillimore, Suggestions 25. Similarly, the "Final Report of the Treatment of Prisoners of War Committee," 30 *I.L.A. Rep.* 236 (1921), contained a set of "Proposed International Regulations for the Treatment of Prisoners of War."

[41] *The Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929*, herein referred to as "the 1929 Convention."

[42] *See* note 2 *supra.*

[43] *See* note 3 *supra.*

war had been omitted,[44] and very quickly after the end of hostilities the ICRC succeeded in securing the convening of another Diplomatic Conference in Geneva. This Conference drafted a new prisoner-of-war convention[45] with many comparatively novel provisions directed at filling the voids which World War II had exposed in the then-existing law. This 1949 Convention has now been ratified or adhered to by 143 nations.[46] It is with the application of its provisions—intended, actual, and to be expected—that the discussion which follows will be concerned.

Writing in 1886, a noted American military lawyer, William Winthrop, said:

> Modern sentiment and usage have induced in the practice of war few changes so marked as that which affects the status of prisoners of war.[47]

While that statement was undoubtedly true in 1886—and is still true when the treatment of prisoners of war today is compared with that which they received a number of centuries ago—the experiences of World War II and those after it make the situation far less roseate than when Winthrop wrote. As has been said:

> A comparison between the conditions under which prisoners were held captive during the Napoleonic wars and those obtaining in Germany, Japan and Russia during the late war [World War II] reveals a progressive change for the worse, which runs exactly parallel to the progress of dictatorship from Napoleon, through Kaiser Wilhelm to Hitler and Stalin.[48]

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[44] It should not be assumed that the 1929 Convention was completely without value. As the late Josef Kunz, an eminent scholar in this field, said: "[T]he fact that millions of prisoners of war from all camps, notwithstanding the holocaust, did return, is due exclusively to the observance of the Geneva Prisoners of War Convention. . . ." Kunz, Chaotic Status 37, 45. The American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany during World War II to compliance with the 1929 Convention. *New York Times*, 2 June 1945, at 8, col. 6. Conversely, it may validly be assumed that millions of Russian prisoners of war held by the Germans, Germans held by the Russians, and Allied prisoners of war held by the Japanese did not return because the 1929 Convention was not technically applicable and was not applied.

[45] *The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, Appendix A.

[46] For a complete list of ratifications and adherences up to 1 June 1977, *see* Appendix B.

[47] Winthrop, *Military Law* 1228. To the same effect, see *British Manual* para. 122. Spaight called prisoners of war "spoilt darlings." Spaight, *War Rights on Land* 265. Thirty-six years and two World Wars later he was more realistic. Spaight, *Air Power*, Ch. XV, *passim*.

[48] Laws, Prisoners of War 94. A similar pessimism is found in Freeman, *Recueil* 309, where the author says: "Considering the experience of United Nations troops in the Korean campaign, an excess of optimism about such matters [application of the Convention] is hardly justified should the inferno of war be unleashed again."

The extent to which there will be compliance with the provisions for the protection of prisoners of war contained in the 1949 Geneva Prisoner-of-War Convention still largely remains to be seen. Unfortunately, very little that has occurred in this area during the quarter century since its drafting augurs well for the future.

C. APPLICABILITY

The first question which arises with respect to any treaty, and which is very much present in the case of the 1949 Geneva Convention is, when and under what circumstances is it to be applied?

Under Article 1 of the Third Hague Convention of 1907 hostilities are instituted by a "reasoned declaration of war or [of] an ultimatum with conditional declaration of war"; and under Article 2 of that Convention the belligerents have the duty to notify neutrals of the existence of a state of war. Of course, were those provisions uniformly complied with by States, the subject under discussion would cause few difficulties, as there would never be any question as to the existence of a legal state of war and of the consequent applicability of the 1949 Geneva Convention. Unfortunately, more often than not, the above-cited provisions of the Third Hague Convention of 1907 have been honored in the breach. In 1914, just seven years after they had become a part of international legislation, Germany attacked Belgium without a prior declaration of war and started a policy which has been followed all too frequently since that time.

Despite the experiences of World War I, the subsequently drafted 1929 Geneva Prisoner-of-War Convention did not contain a provision specifying the conditions under which it was to become applicable. It was apparently believed that in future armed conflicts there would be compliance with the provisions of the Third Hague Convention of 1907, and that there would therefore be no question concerning the applicability of the 1929 Convention. Events did not bear out this expectation. Thus, during World War II a number of Powers found it profitable not to make a formal declaration of war before embarking on hostilities. The German attack on Poland in 1939, the Soviet attack on Finland that same year, and the Japanese attacks on the United States and the United Kingdom in 1941 are but a few of the many well-known instances of the commencement of hostilities during World War II without a prior declaration of war.[49] In addition, Powers have denied the existence of a state of war and, therefore, the applicability of the law of war protecting prisoners of war, by con-

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[49] 2 Lauterpacht–Oppenheim 292–93. But there were a number of cases of compliance with the provisions of the Third Hague Convention of 1907 during both World War I (*ibid.*, at 294 n.2) and World War II (*ibid.*, at 295 n.3). Italy had signed this Convention, but had never ratified it. Nevertheless, Italy did formally declare war on France in June 1940 before commencing hostilities.

testing the legitimacy of the enemy government in cases in which a sovereign State temporarily disappeared because of capitulation, occupation, or annexation, or a combination of these, even though its allies continued to fight. At the very opening phase of World War II Poland was overrun and dismembered, part of its territory going to Nazi Germany and the remainder to the Soviet Union. Thereafter the German Government refused to consider that members of the Polish armed forces who had been captured during the course of hostilities retained the status of prisoners of war.[50] Similarly, Germany refused to recognize the right of any government to speak for prisoners of war who, before the respective capitulations and military occupations, had served in the armed forces of Belgium, the Netherlands, Yugoslavia, etc.; and it took this position whether or not there was a government-in-exile in existence and functioning.[51] In 1940 France agreed to an armistice with Germany (and to another with Italy) under which a large part of its territory remained occupied while the remainder was technically unoccupied and self-governing; and it ceased to be a belligerent. Thereafter, while active hostilities continued with Germany and Italy on one side and France's former allies (principally the United Kingdom and the Commonwealth countries) on the other, the German Government took the position that the members of the French armed forces who had been captured during the hostilities were no longer entitled to prisoner-or-war status, their rights thereafter being subject to negotiations between Nazi Germany and the Vichy French Government.[52] Finally, it had been found advantageous on occasion to deny the existence of a state of war in a particular case by the use of subterfuge or perversion of the facts. Thus, the Sino-Japanese conflict, which dated at least from the Japanese attack at the Marco Polo Bridge in 1937 and which lasted until the end of World War II in 1945, was designated by the Japanese as an "incident" which, they claimed, did not bring the law of war—including that relating to prisoners of war—into effect. This established a pattern by which international armed conflict was termed an "incident," a "police action," a "police operation," etc.,[53] thereby

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[50] 2 *ICRC Analysis* 5.

[51] Bastid, *Droit des gens* 334; 1 ICRC *Report*, 35–36, 189–90; Olgiati, Croix Rouge 705. According to one author, Germany took the position that prisoners of war from Poland and Yugoslavia could not, after the capitulations of those countries, continue to be considered as prisoners of war because "their respective States having ceased to exist, the position of Power of Origin of these captives belonged henceforward to the Reich." Wilhelm, *Status* 10–11, 35 *R.I.C.R.* 525.

[52] 1 ICRC *Report*, 546–47. The so-called Scapini Mission appointed by the Vichy Government replaced the Protecting Power for French prisoners of war held by the Germans after the 1940 Franco-German armistice agreement. *See* Pictet, *Recueil* 87–88.

[53] *I.M.T.F.E.* 1003 & 1008; 1969 Reaffirmation 94.

purporting to establish a base upon which to deny the applicability in a specific conflict of the law of war in general and the law relating to prisoners of war in particular.[54]

Could a country legitimately claim that there was no war, and hence that the Prisoner-of-War Convention was not applicable, because hostilities had not been preceded by a formal declaration of war? Could it deny the applicability of the Prisoner-of-War Convention by giving some name other than "war" to the armed conflict in which it was concededly engaged? Where a country had been overrun and its territory completely occupied by its enemies, could the latter claim that the occupied country had ceased to exist as a nation, that a state of war no longer existed between occupier and occupied, and that individuals captured during the hostilities while serving in the armed forces of the occupied country were no longer entitled to prisoner-of-war status? Would the answer to this latter question be different if the allies of the occupied country were still actively at war with the occupier and if they were, perhaps, furnishing facilities on their soil for a government-in-exile and an armed force of the occupied country? What if only part of the territory of a country had been occupied but it had signed an armistice with its occupier and was no longer an active belligerent? As we have seen, all of these situations had occurred during World War II. All of them could occur again in any future war. All of them urgently required that an agreed solution be reached in advance of the event. The 1946 Preliminary Red Cross Conference recommended that the 1929 Convention be amended to include a provision making it applicable "from the moment hostilities have actually broken out, even if no declaration of war has been made and whatever the form that such armed intervention may take."[55] The Government Experts who met the following year concurred in the need for a provision of this nature, redrafting it to make the Convention applicable "at the outbreak of any armed conflict, whether the latter has, or has not[,] been recognised as a state of war by the parties concerned."[56] Based upon the suggestions it had received, the ICRC drafted a new provision[57] which was approved by the International Red Cross Conference at Stockholm in 1948[58] and was adopted by the Diplomatic Conference in Geneva in 1949[59] with only minor editorial changes.

The first paragraph of Article 2 of the Convention now provides:

> The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or

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[54] *I.M.T.F.E.* 1009 & 1209.

[55] 1946 Preliminary Conference 15 & 70.

[56] 1947 GE Report 103.

[57] Article 2, Draft Revised Conventions 52.

[58] Article 2, Revised Draft Conventions 51.

[59] 1 *Final Record* 243.

> more of the High Contracting Parties, even if the state of war is not recognized by one of them.[60]

The foregoing provisions appear to be plain and unambiguous. They are among those provisions of the Convention which have been given both uniform interpretation and general approval by the commentators.[61] Nevertheless, they have been less than fully successful in securing the application of the Convention even in situations which appear to fall directly within their ambit.

Clearly, the quoted portion of Article 2 is an attempt to cover two situations in such broad terms as to include all possible contingencies:

(1) *"Cases of declared war"*: This is the classical situation, the armed connict which is instituted in compliance with the provisions of the Third Hague Convention of 1907 discussed above. It presents no particular problems. The number of cases which will fall within its terms is comparatively negligible. Apart from the obvious reluctance of a number of nations to declare war formally, they are now confronted not only with the prohibitions of the United Nations Charter but also with the general desire to avoid any use of the term "war."[62]

(2) *"Any other armed conflict which may arise"*: The terminology selected here was intended as a catchall, to include every type of hos-

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[60] This article is one of the "Common Articles" so called because they appear in identical form, *mutatis mutandis*, in all four of the 1949 *Geneva Conventions for the Protection of War Victims.*

[61] *See* Stone, *Legal Controls* 313 n.85, where the author states: "So Art. 2, para. 1, of the revised Prisoners of War Convention, 1949, declaring its provisions applicable not only to declared war but also to "any other armed conflict . . . even if the state of war is not recognised" by a belligerent Contracting Party, is a welcome recognition of the need to place the point beyond doubt." And in Pictet, *Commentary* 22–23, the following appears: "By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient. . . . Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war." And, finally, in Soviet International Law 420, this statement is made: "The absence of a formal declaration of war does not deprive hostilities, which have in fact begun, of the character of war from the point of view of the need to observe its laws and customs. The Geneva Conventions of 1949 require that their signatories apply these Conventions, which are a component part of the laws and customs of war, in the event of a declaration of war or in any armed conflict, even if one of the parties to the conflict does not recognise the existence of a state of war."

[62] The 1969 Reaffirmation states (at 11): "By avoiding the words 'law of war', the ICRC is also desirous to take account of the deep aspiration of the peoples to see peace installed and the disputes between human communities settled by pacific means." It is extremely doubtful that diction alone can change human nature. Fortunately, there has so far been no attempt to substitute the term "prisoner of armed conflict" for "prisoner of war"!

tility which might occur without being "declared war." The words selected were certainly broad enough to accomplish the desired result, *viz.*, that the Convention should be applicable "on the outbreak of de facto hostilities, even if war has not been previously declared, and irrespective of the nature of the armed conflict."[63] A resolution adopted by the World Veterans Federation in 1970 demonstrates the public understanding of the interpretation to be given to this provision. That resolution recalls "that the [1949 Geneva] Conventions apply to armed conflict *of any nature* . . . without regard to how that conflict may be characterized."[64] (Emphasis in original.) The ICRC has been equally comprehensive in its interpretation of this provision. The documents prepared by it for the use of the 1972 Conference of Government Experts state:

> . . . There is no need for a formal declaration of war or for recognition of the existence of a state of belligerency for the application of the Conventions. The occurrence of *de facto* hostilities is sufficient. Thus any disagreement arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 common to the Conventions, even if one of the Parties to the conflict denies the existence of a state of belligerency.[65]

In one of the few cases concerning the 1949 Convention to reach the courts, a major issue was the applicability of the 1949 Prisoner-of-War Convention in hostilities resulting from the "military confrontation" between Malaysia and Indonesia (1963–66). The Privy Council said:

> The trials of the accused were conducted on the assumption, which their lordships do not call in question, that there was an armed conflict between Malaysia and Indonesia bringing the [prisoner-of-war] Convention into operation. Article 2 applies the Convention not only to cases of declared war but to 'any other armed conflict' which may arise between two or more of the High Contracting Parties even if the state of war is not recognised by one of them. The existence of such a state of armed conflict was something of which the courts in Malaysia could properly take

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[63] Pictet, New Geneva Conventions 468. The author goes on to state: "It is inadmissible that a state should be entitled to disregard treaty stipulations simply by opening hostilities without previous notification to the adversary, or by giving such proceedings any other name."

[64] U.N., *Human Rights*, A/8370, para. 160.

[65] 1972 *Commentary*, part one, at 9. This was the position taken by the Indian government in 1963 when it contended that the refusal of the Peoples Republic of China to allow the ICRC to visit Indian prisoners of war held in China violated "the provisions of the Geneva Convention [which] apply to such situations even if a state of war [in the legal sense] does not exist." 2 Cohen & Chiu, *People's China* 1573–74.

judicial notice, or if in doubt (which does not appear to have been the case) on which they could obtain a statement from the Executive.[66]

Despite the foregoing, in at least two instances—one unofficial and one official—the applicability of the Convention has been challenged or denied because there was no "state of war" or no "declaration of war." Thus, a leading scholar in the field of international law in the People's Republic of China apparently went out of his way to question the applicability of the Convention to certain American airmen shot down during the hostilities in Korea (1950–53) because "no state of war exists between China and the U.S."[67] And of even more importance was the refusal of the Democratic Republic of Vietnam (DRV) to apply the Convention to American airmen shot down while flying combat missions over that country (c. 1965–73), on the ground that there had been no declaration of war.[68]

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[66] *Public Prosecutor v. Koi*, [1968] A.C. 853–54.

[67] The full story of this incident, set forth by Professor Cohen in his contribution on the People's Republic of China to what was originally the Harbridge House study on prisoners of war, is worthy of quotation: "In the 1954 dispute over the post-Korean-armistice conviction of eleven United States Air Force personnel for espionage, another leading Chinese scholar of the day, Ch'en T'i-ch'iang, used language that unnecessarily suggested a more restrictive view of the applicability of the GPW Convention. The United States had argued that prior to the armistice the fliers had been shot down either over the 'recognized combat zone in Korea or over international waters.' Instead of simply limiting his argument to the official Chinese position that the fliers had been shot down deep in Chinese territory after secretly entering for purposes of espionage rather than combat, Ch'en ambiguously stated:

> Only captured members of the armed forces of a belligerent can be considered prisoners of war by the captor side. No state of war exists between China and the U.S. U.S. spies who have intruded into China for espionage purposes are not prisoners of war.

Ch'en's remarks were only the murky dicta of a single publicist, to be sure, but they suggested the possibility that the PRC could some day choose to read the phrase 'any other armed conflict' in article 2 restrictively, as North Vietnam appears to have done, in spite of the more conventional position voiced by Chou Keng-sheng vis-à-vis India." Miller, *The Law of War* 239–40. Technically the statement by Ch'en was correct; but he made a poor choice of words. In the absence of armed conflict between two States, a national of one who illegally intrudes into the territory of the other does not become a prisoner of war. The situation of which Ch'en writes is exactly the same as the Powers case in the Soviet Union, except that in China the individuals who illegally intruded were undeniably members of an armed force. (This assumes, of course, the validity of the Chinese factual position.)

[68] A news article from Cairo which appeared in the *New York Times*, 12 February 1966, at 12, col. 3, stated:

> The sources quoted the [North Vietnamese] Ambassador as having rejected the American contention that United States airmen captured in attacks on North Vietnam should be treated as prisoners of war under the terms of the Geneva conventions.

It is apparent, unfortunately, that no matter how clear and unambiguous the provisions of the Convention in this respect may concededly be, some Parties will continue to insist that, and to find reasons why, the hostilities in which they are engaged do not come within the purview of the provisions of the first paragraph of Article 2; and they will frequently, absent strong pressure from friendly Parties, for this reason refuse to apply the Convention for the protection of prisoners of war captured by them during the course of international armed conflict. There appears to be wide agreement that what is needed in this field is not new law, but some method of ensuring the application of, and compliance with, existing law—the 1949 Convention.[69] At the 1971 Conference of Government Experts several of the participants sought a solution to the problem created where one of the parties to an international armed conflict denied the applicability of the Convention.[70] The solutions offered there were, in general, concerned with methods of ensuring the presence of a Protecting Power.[71] While there can be no question of the importance of the Protecting Power in ensuring the application of (and compliance with) the provisions of the Convention, this does not solve the problem which exists when one party to an international armed conflict insists that there are no hostilities within the meaning of Article 2 of the Convention and that, therefore, there is no basis for designating a Protecting Power.

At the 1949 Diplomatic Conference two proposals were made which can be related to this problem. The Greek representative suggested that the existence of a state of belligerency (which would, of course, unquestionably bring the law of armed conflict into effect) should be

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He was reported to have told influential Egyptians that this was impossible "because this is a case where no war has been declared" by either country.

Another article published five months later (*New York Times*, 12 July 1966, at 7, col. 5) said: "The Tanyug dispatch, dated Pnompenh, Cambodia, said that North Vietnam 'does not consider these United States citizens as prisoners of war for it has not declared war on the United States.'" Direct evidence of the effect of the foregoing may be found in the words of one of the American prisoners of war repatriated during the hostilities. He stated: "Any attempt on our part to bring up the fact that we were prisoners of war . . . resulted in it being very forcibly brought to our attention that we were not prisoners but criminals, because our country had not declared war, and had to answer for this." Overly, "Held Captive in Hanoi," *Air Force & Space Digest*, November 1970, at 86, 90. For the ICRC position that the American prisoners of war held in North Vietnam were entitled to the protection of the Convention, see *AEI, Problem* 24.

[69] U.N., *Human Rights*, A/7720: Reply of India, par. 2, at 77–78; Reply of the United States, para. 2, at 91. The ICRC subsequently pointed out that the problem was not novel and it listed 10 private organizations which had put forward initiatives in this regard. 1971 GE Documentation, II, at 22.

[70] 1971 GE Report, paras. 534 & 537.

[71] *Ibid.*, para. 538.

decided by the Security Council of the United Nations.[72] A French proposal, which was actually concerned with the problem of a substitute for the Protecting Power,[73] would have established on a permanent basis, a "High International Committee for the Protection of Humanity," consisting of 30 members elected by the Parties to the Conventions from nominations made by the Parties, by the Hague "International [Permanent] Court of Arbitration" and by the "International Red Cross Standing Committee." Nominations were to be made from

> amongst persons of high standing, without distinction of nationality, known for their moral authority, their spiritual and intellectual independence and the services they have rendered to humanity—
>
> In particular, they may be selected from amongst persons distinguished in the political, religious, scientific and legal domains, and amongst winners of the Nobel Peace Prize—[74]

While this proposal was not incorporated into the conventions, it was the subject of a resolution adopted by the Diplomatic Conference recommending that consideration be given as soon as possible to the advisability of setting up an international body to perform the functions of a Protecting Power in the absence of such a Power.[75]

These two proposals are mentioned here because they suggest alternative approaches to the attempt to solve the problem of how to ensure application of the 1949 Conventions in international armed conflict: one, by the use of an established and continuing political body; the other, by the use of a new body created specifically for the purpose and which is made as neutral and apolitical as it is possible to do in these days of hypernationalism.

The suggested use of the Security Council (or, indeed, of any political body) is not considered to be a feasible solution. That body is composed of representatives of States, voting on the basis of decisions reached in Foreign Offices—decisions which are, in turn, made on the basis of national self-interest and political expediency, and which are not necessarily consonant with the facts. It is inconceivable, for example, that the Security Council would ever have reached a decision, over the opposition of North Vietnam (and, of more importance, of the Soviet Union and, toward the end, of the People's Republic of China), that the situation in Vietnam demanded the application of the

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[72] 2B *Final Record* 11 & 16. Further amplification of the proposal, which was clearly required, was not forthcoming and its adoption was not pressed.

[73] For a discussion of this problem, *see* pp. 269–275 *infra*.

[74] 3 *Final Record* Annex. 21, at 30.

[75] Resolution 2, 1 *Final Record* 361. Some months after the signing of the Convention in 1949 the French Government queried the signatory Governments with respect to the possible implementation of the Resolution. The Governments so consulted displayed a complete lack of interest. 1971 GE Documentation, II, at 21.

humanitarian conventions which govern the law of international armed conflict.[76]

On the other hand, it is believed that a true and effective solution to this problem could be attained by a Protocol to the four 1949 Conventions assigning the power to make a determination as to the existence of a state of international armed conflict, thereby automatically bringing the Conventions into effect, to a preselected international commission; by making the decision reached by that commission as to the existence of a state of international armed conflict binding not only on the States directly involved but also on all other Parties to the Protocol and Conventions; and by providing for the automatic imposition of some type of workable sanctions (such as a ban on the supplying of arms) whenever the commission so created determines that its decision is not being respected by a State party to the international armed conflict in that such State has, despite the internationally sponsored decision as to the existence of an international armed conflict which brings the law of armed conflict into effect, continued to deny the applicability of such law. Such a specially constituted commission of perhaps 25 private individuals, each of whom is of sufficient personal international stature to be able to rise above the politics of his or her own country, each of whom would act as an individual and as his or her personal moral and ethical principles dictated, detached and unaffected by Foreign Office instructions, could well constitute an acceptable, effective international body.[77] The provisions for the selection of the members of such a commission would be sufficiently restrictive to ensure the choice of the type of individual described, without regard to nationality, race, religion, color, or geographical distribution. It would begin to operate as soon as the con-

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[76] In addition, it might be noted that the Security Council undoubtedly already has the power to make such a decision; that it has, heretofore, in effect made such a decision, but always in the context of a call for the cessation of armed conflict so found to exist (*e.g.*, S.C. Res. 233, 22 U.N. SCOR, Resolutions and Decisions of the Security Council 1967, at 2, U.N. Doc. S/INF/22 Rev.2 (1968), adopted 6 June 1967, in which the Security Council stated its concern "at the outbreak of fighting" in the Middle East and called for "a cessation of all military activities in the area"; and S.C. Res. 237, 22 *id.* at 5, adopted 14 June 1967, in which it recommended "scrupulous respect of the humanitarian principles governing the treatment of prisoners of war"), and that it has never exercised its power in the context of the proposal under discussion because to do so would be an admission of its inability to eliminate completely the breach of the peace involved.

[77] While it is true that States refuse to allow questions relating to their "national security" to be decided by international bodies (witness the problems encountered in this respect by the International Court of Justice), it would be difficult for a State to put forward the contention in time of peace that the delegation to a neutral international body of the right to determine when a situation has arisen in which that State must apply humanitarian law would be detrimental to its national security. (It must be borne in mind that we are dealing here solely with *international* armed conflicts.)

stitutive body, consisting of all of the Parties to the Protocol, had made the initial selections, and would be a permanent body, preferably self-perpetuating through a process of co-option.[78] Any Party to the Protocol, whether or not itself involved in an international armed conflict, could, at any time, request a determination by the commission as to whether the then-existing relationship between two or more States was such as to bring the Conventions into effect; the States involved would be invited to present any facts or arguments they desired but would not otherwise participate in the decisionmaking process;[79] an affirmative decision would immediately be binding not only upon the States involved in the armed conflict, but on all of the other Parties to the Protocol;[80] and a subsequent finding by this commission that one or more of the Parties involved in the armed conflict was not complying with the provisions of the applicable humanitarian law—including the law relating to prisoners of war—would automatically, and without further action of any kind, require previously prescribed action on the part of all of the other Parties to the Protocol not involved in the armed conflict.[81]

This proposed solution to the problem of establishing a method whereby States will not be able to deny the applicability of the 1949 Convention in international armed conflict may appear impractical, given the current international climate. However, upon reflection this

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[78] To gain support at the outset and to ensure complete impartiality, it would probably be necessary to deny this body jurisdiction over fact situations existing at the time of its creation.

[79] The United Nations General Assembly has, on a number of occasions, called upon its members "to make effective use of the existing methods of fact-finding" [*e.g.*, G.A. Res 2329, 22 U.N. GAOR, Supp. 16, at 84, U.N. Doc. A/6716 (1968)]. The basic objective of these resolutions has been to encourage the use of fact-finding bodies in the event of disputes. The present proposal would, in effect, merely create a new specialized fact-finding body and provide for certain results to flow automatically if specified facts are found. It is a variation and expansion of the idea of the ad hoc Commission of Inquiry originally provided for by the First Hague Convention of 1899 and used for the first time in the *Dogger Bank Incident* (Scott, *Hague Court Rep.* 403).

[80] This is really provided for in Article I of the Convention. *See* pp. 26–27 *infra*. The decision would have no legal effect except to require the application of the humanitarian rules contained in the 1949 Geneva Conventions. It would *not* be a determination of the existence of a legal state of war.

[81] The present author first made this proposal in March 1970 in the Working Paper for the Fourteenth Hammarskjöld Forum. *See* Carey (ed.), *When Battle Rages, How Can Law Protect?* 8–11 (hereinafter Levie, Working Paper). Subsequently, a somewhat similar suggestion was made in the context of Article 3 dealing with internal armed conflict. U.N., *Human Rights*, A/8052, at paras. 159—61; and 1971 GE Report, paras. 192–218. (There does not appear to be any reason why the same body could be empowered to act in both areas, even by different groups of States, if this were desired.) Another writer in this field has also since made a similar suggestion. Bindschedler 56. *See also* the proposal made to the 1974 Diplomatic Conference in para. 8(b) of the 1973 NGO Memorandum.

reaction may become somewhat less valid. Each and every one of the 143 States that have become Parties to the Conventions considers that, should it become involved in international armed conflict, it would be the participant fighting a just war—and that the application of humanitarian provisions of the law of war would be in its favor and against the aggressor with whom it would be engaged in international armed conflict. Why, then, should it not support a proposal which will ultimately be of benefit to it should it be forced to engage in international armed conflict? Moreover, to what will it have agreed? Merely that a neutral, internationally created body, which it helped to create, may determine that a situation in which the State may unexpectedly find itself at some future time calls for the application of the humanitarian law of international armed conflict. What would that mean to it? Only that it could not kill, or otherwise maltreat, protected persons such as the sick and wounded, prisoners of war, and civilian noncombatants, and that it must meet certain minimum standards in its treatment of these individuals. Can any State advance the argument that it refuses to ratify such an international agreement because it does not wish to have its "national security" jeopardized by having its sovereign power of action limited in these respects, that it wishes to retain an unfettered ability to kill and maltreat these individuals at will? Moreover, once an international convention covering the foregoing proposal has been drafted and is presented for signature and ratification, the moral and humanitarian pressures to bring about its legal acceptance by individual States would be tremendous and there would be an excellent possibility of its general acceptance.[82] While certain States that have adopted obsolete attitudes magnifying national sovereignty might well strongly oppose such a proposal, it is predictable that they would participate, albeit reluctantly, in any diplomatic conference convened to draft such a Protocol and would even-

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[82] Certainly, the 143 ratifications and accessions to the 1949 Geneva Conventions, which were drafted before many of the acceding States were even in existence as members of the international community, were not obtained merely because of an overwhelming urge on the part of nations to be bound by these humanitarian rules in the event they became involved in international armed conflict. They were obtained because of moral and humanitarian pressures and because few nations were willing to be pointed at as not having accepted these great expressions of humanitarian aspirations. (Pressure of this same type was brought on the United States because of its failure to ratify the 1925 Geneva Gas Protocol.) At least one writer does not think that the proposal would be acceptable to States. Bond, Proposed Revisions 258. However, the final session of the Diplomatic Conference which adopted the 1977 Protocol I (*see* text, pp. 91–01) included therein an *Article 90* entitled "International Fact-Finding Commission." This Article adopts many of the ideas set forth in the text and previously urged elsewhere insofar as inquiring into alleged grave and serious breaches of the 1949 Convention and the 1977 Protocol are concerned. (For a more detailed discussion of Article 90, *see* pp. 90–1).

tually, rather than risk international opprobrium, become parties to it. It is believed that in this era of almost ceaseless armed conflict,[83] the time is past when States may argue "national sovereignty" and "national security" as excuses for refusing to participate in the creation of an international institution the sole function of which will be to eliminate excuses for refusing to recognize the existence of international armed conflict, with the resultant applicability of certain specific humanitarian laws.

There is one patent ambiguity in the quoted provisions of the first paragraph of Article 2 which requires mention. It will have been noted that the paragraph concludes with the phrase "even if the state of war is not recognized by one of them." What is the legal situation if a state of war is not recognized by two, or several, of the parties to the armed conflict? The legislative history of the Article is not helpful. Apparently, the drafters did not visualize the possibility that among the High Contracting Parties engaged in international armed conflict there might be more than one State that refused to recognize that the situation was such as to bring the matter within the provisions of the Convention, thereby requiring the applicability of its humanitarian provisions. Obviously, the literal wording of the Article does not cover all of the possible contingencies, including, for example, the situation which existed during the armed conflict in Vietnam where neither the Democratic Republic of Vietnam nor the United States, for different reasons, recognized the existence of a legal state of war.[84]

This problem was perceived within a short time after the 1949 Diplomatic Conference had completed its work. In 1952 Lauterpacht pointed it out and said: "The intention was probably to say by 'one or both of them.' This, it appears, is the correct interpretation of the Convention."[85] Certainly, his interpretation would seem to be fully justified —although it probably does not go far enough. We are dealing with a humanitarian convention. It should be liberally construed in order to

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[83] Between 1945 and 1968 there were approximately 130 armed conflicts, of which well over 50 percent had international implications. SIPRI, *Yearbook of World Armaments and Disarmament, 1968/1969*, Tables 4A.1 & 4A.2 at 366–73.

[84] The Republic of Vietnam (South Vietnam) did, at least for some purposes, recognize the existence of a legal state of war. *Ordinance of June 24, 1965, Promulgating the State of War throughout the Republic of Vietnam. See* Prugh, *Law at War* 62.

[85] Lauterpacht–Oppenheim 369 n.6. For agreement with this view see Pictet, *Commentary* 23, and Draper, *Recueil* 73. Two years later the Diplomatic Conference that drafted the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* changed the wording of the cognate provision (Article 18(1)) of that Convention to read "even if the state of war is not recognized by one *or more* of them." (Emphasis added.) One author believes that even this could be improved, and any remaining ambiguity removed, by using the phrase "*par aucune d'entre elle*" ("by any of them"). Meyrowitz, *Les armes biologiques et le droit international* 22 n.46.

give the maximum protection. It simply does not make sense to say that if one of two parties to an international armed conflict (50 percent of those involved) denies the existence of a state of war the Convention is nevertheless applicable; but that if two of twenty parties to an international armed conflict (10 percent of those involved) make such a denial the Convention is inapplicable. The manifest purpose of the Convention was to afford humanitarian protection to individuals. Just as States may not make agreements derogatory of the protections so afforded,[86] they should not be permitted to offer an interpretation which will completely eliminate the applicability of the Convention in a situation to which it was unquestionably intended to be applicable.[87] Moreover, the provision should be construed in such fashion that no matter how many participants take the position that a "state of war" does not exist, the actual fact of armed conflict will suffice to make the Convention applicable. If it is not so construed, it will have all of the pejorative aspects of the much condemned general participation clause —with the additional adverse factor that the decision that the Convention is not to be applied will be based not on the indisputable fact of the participation in the hostilities of a non-Party to the Convention, but on the mere unilateral, subjective whim of belligerents.

Paragraph 2 of Article 2 makes the 1949 Convention applicable "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Once again this was an attempt to prevent a repetition of events which had occurred during World War II. Thus, when Poland was totally occupied and, in effect, dismembered by Germany and the Soviet Union in 1939, the position was taken by the German Government that inasmuch as there was no longer a Polish State, there was no longer a legal basis for a Protecting Power to protect Polish interests—which would, of course, include the protection of the rights of members of the Polish armed forces previously taken as prisoners of war.[88] The German Government thereafter took a similar position with respect to Yugoslavia, the Free French, and Italy after 1943.[89] All of these States had been the subject of complete or partial military occupation. However, the problems arising here, insofar as the 1949 Convention is concerned, are really relative to the right of an individual to continue to be entitled to prisoner-of-war status and to the

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[86] *See* the discussion of Article 6 of the Convention, pp. 84–86 *infra*.

[87] One commentator states with, unfortunately, some justification, that "adhering parties are not bound to know the undisclosed intentions of the drafters of conventional language that is inconsistent with words actually used." Rubin, Status of Rebels 447.

[88] Bastid, *Droit des gens* 334. The author there correctly points out that, to a considerable extent, this same position was taken by the Allies after the German capitulation in 1945.

[89] Pictet, *Recueil* 87–88. *See also* 1 *ICRC Report* 35–36, 189–90.

position of the Protecting Power. It is believed that these problems are more properly included in the discussion of those specific areas.[90]

The third paragraph of Article 2 deals with the problem created when one of the belligerents in an international armed conflict is not a party to the Convention. It will be recalled that the Fourth Hague Convention of 1907 included among its provisions a general participation clause.[91] The opposite approach was taken in the 1929 Convention, which provided that if one of the belligerents was not a party to it, "its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto."[92] During World War II no belligerent denied the applicability of the 1929 Convention merely because of the fact that several of the belligerents, particularly the Soviet Union and Japan, were not parties thereto. The first sentence of the third paragraph of Article 2 is merely a rephrasing of the provision contained in its predecessor. It provides that even if "one of the Powers in conflict"[93] is not a party to the Convention, "the Powers who are parties thereto shall remain bound by it in their mutual relations." This provision should present no problems. However, the second sentence of the paragraph constitutes a somewhat new concept. In order to encourage belligerents to comply with the provisions of the Convention even if they are not Parties thereto, it provides that contracting parties shall "be bound by the Convention in relation to the said [nonparty] Power, if the latter accepts and applies the provisions thereof." This procedure probably derived from the, at times, successful efforts of the ICRC during World War II to persuade nonparty belligerents to comply with the 1929 Convention on a reciprocal basis.[94] Thus, although there is a duty on parties engaged in international armed conflict to comply with the provisions of the Convention even in the face of noncompliance by an adversary which is a Party—reciprocity not being a requirement for this obligation[95]—it is a requirement when a nonparty is involved in the international armed conflict[96] inasmuch as the nonparty must both accept *and* apply the provisions of the Convention in order to create the right to expect compliance

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[90] *See* pp. 66–68 *infra*, and 262–275 *infra*, respectively.

[91] *See* note 38 *supra*.

[92] Article 82.

[93] Once again it would have eliminated possible controversy had the provision been made to read "one or more of." *See* note 85 *supra*.

[94] 1 ICRC *Report*, 189. For what was a less than successful effort in this regard, see *ibid.*, 408–36.

[95] Pictet, *Commentary* 17–18. Concerning the problem of reciprocity, see pp. 29–32 *infra*.

[96] Draper, *Recueil* 74. He points out that this situation occurred during the 1956 Suez Conflict, at which time Egypt was already a Party and the United Kingdom was not. The latter made a declaration that it would accept and apply the Convention.

on the part of the Party to the Convention.[97]

It might be asked why a Power would not elect to ratify or accede to the Convention, even while it is engaged in international armed conflict, rather than to rely on its adversary's recognition that it has accepted and is applying the Convention. This was apparently foreseen as a possibility by the draftsmen, for, while Article 138 (which deals with normal ratifications) and Article 140 (which deals with normal accessions) both provide for a six-month delay before becoming effective, Article 141 affirmatively provides that when international armed conflict as specified in Article 2 occurs, any ratification or accession then pending or thereafter made by a belligerent shall be given effect immediately. It may be assumed that this is the procedure that any State not a party to the Convention would follow if it became involved in international armed conflict.[98]

Some years ago a dispute arose with respect to the applicability of the Convention in cases involving the United Nations, the suggestion having been made that the law of international armed conflict, including the 1949 Convention, was binding on any State in conflict with a United Nations armed force, but was not binding on the latter.[99] This suggestion caused quite a furor for a time but there now appears to be general agreement that the law of international armed conflict, including the 1949 Convention, is applicable to both sides in any United Nations enforcement action.[100] This is substantially the position taken by the United Nations itself.[101]

To summarize, the provisions of Article 2 were intended to, and do, make the 1949 Convention applicable in the following:

(1) All cases of war formally declared between two or more Parties;

(2) All other cases of armed conflict between two or more Parties;

(3) All cases of armed conflict between two or more Parties no matter what designation such conflict may be given;

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[97] This creates a strange situation. Parties to the Convention are bound to comply with its provisions vis-à-vis nonparties only on a reciprocal basis. By acceding to the Convention during the course of the international armed conflict instead of merely "accepting and applying" it, the former nonparty can create a legal obligation on the part of the adversary party to comply with the provisions of the Convention even if the former nonparty does not, in fact comply. In other words, by becoming a Party to the Convention the former nonparty belligerent can eliminate the requirement of reciprocity on its part!

[98] Of course, in view of the number of States already Parties to the Convention (see Appendix B), this problem is almost moot.

[99] "Should the Laws of War Apply to United Nations Enforcement Action?" 1952 *Proc. A.S.I.L.* 216, 217.

[100] 50 *Annuaire de l'Institut de Droit International* 376 (II, 1963); 54 *ibid.* 449 & 465 (II, 1971); Soviet International Law 407; 66 A.J.I.L. 465 (1972); Bothe, *Le droit de la guerre et les Nations Unies* 187–207; Simmonds, *Legal Problems* 177–96.

[101] Seyersted, *United Nations Forces* 190–92.

(4) All cases of armed conflict between two or more Parties even if the existence of a legal state of war is not recognized, or is denied, by one or more of them;

(5) All cases of the occupation of a part or all of the territory of one Party by the armed forces of one or more other Parties, whether or not such occupation is preceded, accompanied, or followed by armed resistance;

(6) All cases of armed conflict between two or more Parties even if one Power, or more than one Power, to the armed conflict is not a Party; and

(7) All cases of armed conflict involving a Power, or Powers, not a Party, on a reciprocal basis, if the Power, or Powers, not a Party, accepts and applies the provisions thereof.

D. COMPLIANCE

Parallel with the problem of applicability is the problem of compliance. If the international armed conflict is within the provisions of Article 2 of the Convention, what are the requirements for compliance and how is compliance assured and enforced?[102]

Article 82 of the 1929 Convention stated that "the provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances." The 1949 Convention made two improvements in this stipulation. In the first place, the importance attached to this provision by the 1949 Diplomatic Conference (which followed the lead of the participants in the preliminary conferences convened by the ICRC) was demonstrated by its removal from a position near the end of the treaty to one of major prominence as the very first article of the 1949 Convention. In the second place, it now provides not only that the Parties "undertake to respect" the 1949 Convention "in all circumstances"[103] (the sole requirement of the 1929 Convention), but also that they "undertake . . . to ensure respect for" the Convention. Thus, every Party to the Convention has explicitly accepted the obligation of "ensuring" that every other Party to the Convention complies with its provisions;[104] and has implicitly accepted the obligation

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[102] *See* Gass, Can the POW Convention Be Enforced? 27 *JAG J.* 248.

[103] "In all circumstances" can logically only mean *under all of the circumstances set forth in Article 2*. Pictet, *Commentary* 18.

[104] One of the proposals made at the 1971 Conference of Government Experts said:

> That there should be collective supervision and enforcement by all States Parties to the Geneva Conventions not engaged in the conflict, operating under the theory of collective responsibility implicit in Article 1 common to the Geneva Conventions of 1949.

1971 GE Report 114, Proposal No. 15. (*But see* note 110 *infra.*) Another indica-

of soliciting and encouraging compliance by nonparties who are involved in international armed conflict.

The importance of this new aspect of the Article cannot be overstated. The change first appeared in the preliminary work done by the ICRC during the period between the end of World War II and the convening of the Diplomatic Conference in April 1949.[105] In explaining this proposed addition to the wording of the Article, the ICRC said:

> The ICRC believes it necessary to stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention. They must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied.[106]

It cannot be doubted that the moral pressure which could be applied to States engaged in international armed conflict, whether or not Parties to the Convention, by the many States which are Parties thereto and which are not involved in the particular conflict, would be a tremendous force for compliance—a force which would frequently be the determining factor in convincing a belligerent to decide to comply with the Convention in the international armed conflict in which it is then engaged. Unfortunately, experience since 1949 has demonstrated a strong reluctance on the part of Parties to the Convention to insist, or even to suggest, that Parties so engaged in international armed conflict have a duty to comply with its provisions.[107] This is

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tion of the generally broad interpretation which this obligation receives is the following:

> Thus the International Committee of the Red Cross . . . appears to have taken the position that, since the United Nations had not acceded to the Geneva Conventions, each contracting party to these Conventions would remain responsible for their application by any contingents they might provide for the United Nations, and even that they had a moral obligation to do what they could to ensure such application by other contingents, too.

Seyersted, *United Nations Forces* 192.

[105] *See, e.g.*, the draft convention submitted by the ICRC to the XVIIth International Red Cross Conference which met in Stockholm in August 1948 (*Draft Revised Conventions* 51) and the "Stockholm Draft" adopted by that Conference (Revised Draft Conventions 51).

[106] *Draft Revised Conventions* 5. Article 1(1) of the 1977 Protocol I is identically worded.

[107] *The White Paper on the Application of the Geneva Conventions of 1949 to the French-Algerian Conflict*, issued by the Algerian Office in New York in 1960, said (at 3):

> In conclusion, we shall point to the need and responsibility of the signatories to the Geneva Conventions to use their good offices with the Government of France, to achieve its recognition of the obligation it has assumed "to respect and ensure respect" for the Geneva Conventions.

Despite this clarion call for nonbelligerent Parties to take the action which they had pledged to take in becoming Parties, in the detailed and well-documented discussion written by Dr. Bedjaoui concerning the attempts by the Provisional Gov-

particularly true with respect to neutral States,[108] but it is often true even as to allies.[109] Despite the clear and unambiguous provisions of the Convention, many States would very probably consider any such efforts as interference in the internal or domestic affairs of another sovereign State, even though compliance with the provisions of a

ernment of Algeria to secure compliance by the French with, first, Article 3 of the 1949 Conventions and, later, the Conventions *in toto*, there is not a single word to indicate the intervention of any other Party seeking to ensure respect for the Conventions by the French Government. Bedjaoui, *Law and the Algerian Revolution* 183–99; 207–20. Even the Government of the United Kingdom of Libya merely acted as a conduit between the Provisional Government of Algeria and Switzerland, the depositary. *Ibid.*, 183 & 189.

[108] One of the preambular clauses of Res. XXIII, Human rights in armed conflict, 12 May 1968, *Final Act of the International Conference on Human Rights*, U.N. Doc. A/CONF.32/41, at 18 (1968) stated:

> *Noting* that States parties to the Red Cross Geneva Conventions [*sic*] sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.

While there were many private voices raised concerning the refusal of India for almost two years to comply with the specific release and repatriation provisions of the Convention after the December 1971 surrender by the Pakistani forces in East Pakistan (now Bangladesh), the official voices of Governments were conspicuous by their silence—or perhaps they were just too low in key to be heard, especially by India. During the course of the hostilities in Vietnam, some States found it possible to condemn the United States and the Republic of Vietnam for alleged violations of the Convention. However, this was probably only because of their animus due to the basic fact that the United States was involved in those hostilities. These same States made no effort whatsoever to seek to obtain compliance with the Convention by the Democratic Republic of Vietnam and by the Vietcong, despite their close relations with these two latter, both of which admittedly and publicly refused to comply with the Convention as a matter of official policy.

[109] Early in the United States involvement in Vietnam there was severe criticism of the United States because it appeared that no action was being taken by the latter while the armed forces of the Republic of Vietnam publicly violated the Convention. *See, e.g.*, Massachusetts Political Action for Peace, *What Are We Tied to in Vietnam?* (1964). Two years later the *New York Times* reported: "The major United States effort, besides setting up its own procedures, has been to persuade the South Vietnamese to go along. [South Vietnamese] Government officials, once openly hostile to the Convention, now grudgingly accept the American position. Much remains to be done, however, to persuade the average South Vietnamese soldier to stop using torture." *New York Times*, 1 July 1966, at 6 col. 3 Concerning the basic legal problem one commentator has stated: "The responsibility of one member of a multinational or combined force for the quality of prisoner treatment accorded by another is still undefined and awaits further debate to determine the extent to which a positive supervisory duty should be imposed." Smith, Appraisal 902. In Levie, Maltreatment in Vietnam 339, the statement was made that there was "no legal duty imposed upon the United States by the 1949 Convention to ensure that South Vietnamese troops did not maltreat personnel captured by them." As should be clear from the material immediately preceding and immediately following the quoted sentence, what was meant by that statement was that a Party was not *legally responsible* for its ally's failure to comply with the provisions of the Convention, particularly if it had used its best efforts, albeit unsuccessfully, to obtain compliance.

multilateral, almost universal, convention concerning the treatment of prisoners of war in international armed conflict would appear to be about as "external" and "nondomestic" a matter as could be found.[110]

In order to overcome the reluctance of States to act in this area, and to comply with the specific admonition which they accepted in Article 1,[111] the legal argument has sometimes been advanced that this article constitutes a waiver of the provisions of Article 2(7) of the Charter of the United Nations. However, such an argument appears to embark on too profound, too complicated, and too controversial a legal thesis. The subject matter involved is clearly international in scope; authority for the intercession of States not involved in a particular international armed conflict is clearly present in the specific wording of Article 1 and the obvious intention of the 1949 Diplomatic Conference; such intercession cannot be considered an unfriendly act or an unwarranted interference by the interceding State in the affairs of the States so engaged in international armed conflict; hence, there does not appear to be any need to support compliance with this provision with the extremely controversial argument concerning the inapplicability of the Charter restriction.

The undertaking of each Party to the Convention to respect it *under all circumstances*, together with the concomitant obligation of all other Parties to the Convention to ensure respect for it, results in an obligation which is absolute in character and which is not based upon reciprocity. It is in the nature of a statutory obligation owed to all other Parties, rather than a contractual obligation owed only to a

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[110] Perhaps as a result of the proposal made at the 1971 Conference of Government Experts (see note 104 *supra*), the 1972 Draft Additional Protocol prepared by the ICRC for the consideration of the 1972 Conference of Government Experts contained the following provision:

> *Article 8. Co-operation of the High Contracting Parties.* 1. The High Contracting Parties being bound, by the terms of Article 1 common to the Conventions, to respect and to ensure respect for these Conventions in all circumstances, are invited to co-operate in the application of these Conventions and of the present Protocol, in particular by making an approach of a humanitarian nature to the Parties to the conflict and by relief actions. Such an approach shall not be deemed to be an interference in the conflict.

1972 *Basic Texts* 7. Obviously, this was intended as an invitation for concerted efforts by neutral Parties to obtain compliance with the provisions of the Convention in any international armed conflict in which they were not being applied. Unfortunately, but perhaps not unexpectedly, the arguments were quickly advanced at the 1972 Conference of Government Experts that this would amount to intervention, that there was a duty to respect national sovereignty, that there was a duty of noninterference in the domestic affairs of other States, etc. 1972 GE Report 185. Predictably, the proposed article was not included in the 1973 Draft Additional Protocol which was prepared by the ICRC as the working paper for the 1974 Diplomatic Conference.

[111] Not one State which ratified or acceded to the 1949 Convention made a reservation to the requirements imposed by Article 1.

Party's adversary in an international armed conflict.[112] The question then arises as to the extent to which belligerent Parties can be expected to continue compliance in the face of manifold violations, or even utter disregard, of the Convention by the other side.

When the United States Senate was determining whether it should give its advice and consent to the ratification of the 1949 Geneva Conventions, the then General Counsel of the Department of Defense made the following statement:

> Should war come and our enemy should not comply with the conventions, once we both had ratified—what then would be our course of conduct? The answer to this is that to a considerable extent the United States would probably go on acting as it had before, for, as I pointed out earlier, the treaties are very largely a restatement of how we act in war anyway.
>
> If our enemy showed by the most flagrant and general disregard for the treaties, that it had in fact thrown off their restraints altogether, it would then rest with us to reconsider what our position might be.[113]

During the armed conflict in Korea the United States complied with the 1949 Convention despite what amounted to almost total disregard of its provisions by the North Koreans and the Chinese Communists.[114] During the armed conflict in Vietnam the United States attempted to comply with the 1949 Convention despite the denial by both the North Vietnamese and the Vietcong that the Convention was even applicable.[115] Whether the United States, or any other Party to the Convention, will long continue to comply with the Convention in the face of a total disregard of its provisions or outright refusal to apply it by

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[112] U.N., *Human Rights*, A/7720, para. 82; Draper, *Recueil* 72. Unlike the 1949 Convention, the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* specifically provides, in Article II thereof, for a withdrawal of protection (limited to the particular property involved), where a violation occurs and persists.

[113] Testimony of Wilber M. Brucker, 1955 Hearing 11.

[114] None of the participants in those hostilities had as yet ratified or acceded to the Convention—but they agreed to be bound by its "humanitarian principles." For documentation on the completely unsuccessful efforts of the ICRC to obtain compliance with the four 1949 Conventions by the North Koreans and later by the so-called Chinese People's Volunteers during the hostilities in Korea (1950–53), see ICRC, *Conflit de Corée, passim*. For the manner in which compliance with the 1949 Prisoner-of-War Convention in those hostilities by the United Nations Command was used for aggressive purposes by the North Koreans and the Chinese, see U.N.C., Communist War, *passim;* U.K., *Treatment, passim;* and U.S., *POW, passim.*

[115] While there were undoubtedly numerous violations of the 1949 Convention by members of the armed forces of both the United States and the Republic of Vietnam, these were the acts of individuals, not the result of the national policy of the Parties concerned and, when evidence was available, the individual who committed the violation was punished therefor. *See, e.g., United States v. Griffen.*

the other side in a future international armed conflict remains to be seen. Certainly, should another such adversary adopt a similar attitude, it can be assumed that the United States might well do what it has said it would do—"reconsider what [its] position might be"—if for no other reason than to bring pressure to bear to obtain proper treatment for members of its armed forces held as prisoners of war, treatment which they did not receive in either of the two international armed conflicts mentioned.

Commentators generally appear to be agreed that few States can actually be expected to continue to apply the provisions of the Convention in the absence of reciprocity despite the provision to that effect contained in the Convention.[116] At first glance, from a humanitarian point of view, this appears to be extremely unfortunate, as it means that where one side fails to comply with the Convention, *all* prisoners of war held by both sides will be denied the safeguards of the Convention. On the other hand, however, if a Party can only ensure that members of its armed forces held as prisoners of war will receive the humanitarian treatment contemplated by the Convention by affording such treatment to the enemy prisoners of war which it holds in custody, this may, in the end, prove more humanitarian than unilateral compliance as it may well result in *all* prisoners of war held by both sides receiving Convention treatment. This outcome will, of course, depend upon many factors, the principal ones being the general national attitude of a Party toward compliance with its international commitments[117] and its concern for the well-being of its own

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[116] Miller, *The Law of War* 219, 230–31, 256, 261, & 262. This problem was demonstrated by events which occurred in the Middle East after the October 1973 hostilities. Syria refused to furnish the names of the Israeli prisoners of war held by her or to allow the ICRC to visit them. Israel, which had furnished the names of Syrian prisoners of war, then refused to allow the ICRC to visit them. The difficulties escalated and, finally, on 21 January 1974, the ICRC sent an appeal to all 135 States Party to the Convention which stated, in part:

> . . . The competent authorities all too often make reciprocity a condition for the application, totally or in part, of the Geneva Conventions. This is equivalent, in prevailing circumstances, to the exercise of reprisals. . . . The ICRC emphasizes that commitments under the Geneva Conventions are absolute, and that States, each one to all others, bind themselves, solemnly and unilaterally, to observe in all circumstances, even without any reciprocal action by other States, the rules and principles which they have recognized as vital.

14 *I.R.R.C.* 76–77.

[117] In discussing the problem of compliance, one commentator draws what appears to be a valid distinction between States which are *law-abiding* (those which are "basically disposed toward compliance with the law of war as a matter of national policy") and States which are *law-defying* (those which are "neglectful of the law of war or disposed to violate it"). Baxter, Compliance 82.

captured personnel.[118]

One of the major reasons why the Austinian school of legal philosophy denies that international law is, in fact, law is because of its lack of sanctions, its lack of enforcement procedures in the face of violations—and the law of international armed conflict in general, and that portion thereof relating to prisoners of war in particular, is, unfortunately, largely subject to this criticism. As we have seen, great reliance was placed by the draftsmen of the 1949 Convention on the moral suasion to be applied by other Parties to the Convention who were not involved in the international armed conflict, all of whom would have agreed to "ensure respect" for its provisions. As we have also see, this has been, and can be expected to continue to be, somewhat less than perfect as a method of obtaining substantial compliance with the Convention. What other forces for compliance with the Convention are available? One of the recognized experts in this area of the law has suggested five: (1) the threat of punishment of individual violators as criminals; (2) the threat of the award of "compensation" against States which violate the Convention and in favor of States which are the victims of such violations; (3) world public opinion; (4) third-party protection and inspection; and (5) instruction of members of the armed forces and annual reporting of the nature and extent of such training.[119]

The first two "forces" listed are obviously effective only as deterrents, as threats of action which will be taken after the act and, usually, against a defeated foe; the threat of punishment of individuals for violations of the Convention is probably just as effective as the threat of punishment inherent in any penal code;[120] the threat of the

[118] It is for this latter reason that it is particularly difficult to understand the attitude taken by the Soviet Union in 1941–42 when Germany, which held many, many more Russians as prisoners of war than the Soviet Union held Germans, was willing, on a strictly reciprocal basis, to take some small steps to ease the life of the captives held by both sides. The strenuous efforts of the ICRC to effectuate that willingness collapsed because of what can only be described as lack of interest on the part of the Soviet Union. 1 ICRC *Report*, 408–25. The miseries endured by, and the deaths of, literally hundreds of thousands of Russian prisoners of war in German hands can be attributed, at least in some small part, to that seemingly inexplicable decision of the Soviet Government of that time. 3 ICRC *Report* 55; Dallin, *German Rule* 426. It can only be explained by the belief, later clearly demonstrated by the same Soviet Government, that all Russian military personnel taken prisoners of war were of no further value and either had been, or had become, traitors to their country. Eisenhower, *Crusade in Europe* 469; Fehling, *One Great Prison* ix; Dallin, *German Rule* 420, 426. *See* notes VI-79 and VII-141 *infra*. *see also* Garthoff, *Soviet Military Doctrine* 251; Shub, *The Choice* 44–45; Bethell, *The Last Secret*, *passim*.

[119] Baxter, Compliance, *passim*.

[120] Of course, a member of the armed forces of a "law-abiding" State knows that he can anticipate punishment by his own national authorities, just as he would be punished for any other crime which he committed. *See, e.g.*, note 115 *supra*

possible award of money damages[121] will not be very effective against a State which is fighting for its very existence and which is, in any event, spending much of its national treasure in prosecuting an international armed conflict.[122] World public opinion is both amorphous and ephemeral. It is exceedingly difficult to arouse and almost impossible to maintain for a sufficient period of time for it to be effective.[123] Third-party protection and inspection—on-the-spot policing of compliance by a neutral—is unquestionably an effective force for compliance. It is probably the most effective method of securing compliance with the 1949 Convention presently available.[124] And instruction of the members of the armed forces of Parties with respect to the conduct legally imposed upon their nation generally and on each of them personally by the provisions of the Convention is certainly a matter of absolute necessity if individual compliance from the great mass of the military is to be obtained.[125] But, of course, the imposition of wartime sanctions against a Party which violates, or permits violations of, the provisions of the Convention, discussed above,[126] is, most certainly, a sixth potential method of ensuring compliance with the provisions of the Convention—a method which has not, up to this point in time, been exploited.[127]

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[121] Compare Article 3, *Fourth Hague Convention of 1907*, and Article 131 of the 1949 Prisoner-of-War Convention, and Article 91 of the 1977 Protocol I.

[122] The "reparations" levied against Germany after World War I obviously did not deter Nazi Germany from embarking on World War II.

[123] Iklé, After Detection–What? 39 *For. Aff.* 208, 209. A notable exception was the success of the United States in mobilizing world public opinion against the war crimes trials of captured American pilots projected by North Vietnam in 1966. Levie, Maltreatment in Vietnam 344–45; Smith, Appraisal 902–04. Pakistan was considerably less successful in mobilizing world public opinion when India violated the Convention by continuing to detain the 90,000 Pakistani prisoners of war held by her for almost two years after the cessation of hostilities.

[124] *See* the discussion of the Protecting Power at pp. 262–293 *infra*.

[125] Article 127 of the Convention mandates the obligation "to include the study [of the Convention] in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population." Unfortunately, there is no requirement for reports concerning the extent of compliance with the foregoing provisios. However, *see* 1969 Implementation, II, at 12–137. *See also* 1973 Implementation, *passim*. Article 72(3) of the 1973 Draft Additional Protocol was intended to rectify this omission. Concerning this problem, *see* pp. 93–96 *infra*.

[126] *See* pp. 19–22 *supra*. *See also* Levie, Working Paper 13–14.

[127] On several occasions the General Assembly of the United Nations has adopted resolutions [*e.g.*, G.A. Res. 2676, 25 U.N. GAOR, Supp. 28, at 77, U.N. Doc. A/8028 (1971)] calling upon "all parties to any armed conflict to comply with the terms and provisions of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949"; but it has never recommended that sanctions be imposed by the Security Council for noncompliance, no matter how patent the violation or violations may have been.

It should be obvious from the foregoing discussion that one area of the Convention which greatly needs review and improvement is that pertaining to its enforcement; and that the ideal sought—full compliance by all States engaged in international armed conflict—will only be attained when all Parties to the Convention affirmatively display a willingness to participate in the task of securing compliance without regard to the identity of the belligerents.

E. ENTITLEMENT TO PRISONER-OF-WAR STATUS

We come now to another area of the Convention which was, foreseeably, inadequately drafted,[128] as has been demonstrated in the period since 1949: the identification of the individuals who are entitled to be designated prisoners of war and who therefore are entitled to the protection of all of the benefits and safeguards set forth in the Convention. Article 4, the basic Article dealing with the subject,[129] is the longest and most detailed Article in the Convention. Unfortunately, it contains a number of seeds of controversy.

Article 3 of the Regulations attached to the Second Hague Convention of 1899 and to the Fourth Hague Convention of 1907 both stated "[i]n the case of *capture by the enemy*, [members of the armed forces] have a right to be treated as prisoners of war."[130] (Emphasis added.) Article 1 of the 1929 Convention gave prisoner-of-war status to those persons within the categories specified in the 1907 Hague Regulations who had been "captured by the enemy." The 1947 Conference of Government Experts recommended that the new convention then under discussion "should itself enumerate these classes of persons" (and not incorporate the provisions of another treaty by reference), and that they should benefit from the protection of the convention "when they fall into enemy hands."[131] These recommendations were adopted, and the draft convention prepared by the ICRC for the use of the 1948 Stockholm Conference defined prisoners of war as those individuals belonging to one of the categories listed therein "who have fallen into enemy hands."[132] At Stockholm the quoted phrase was changed to "who have fallen into the power of the enemy." This was included in

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[128] Baxter, Unprivileged Belligerency 327.

[129] We shall here deal primarily with Articles 4 and 5 of the Convention. However, not only will a number of the other articles of the Convention—such as 33, 85, etc. —have an impact on this problem, but we must also bear in mind the cognate provisions of the First and Second Conventions.

[130] Only the French version of these Conventions was official. In Articles 4 and 7 of both sets of Regulations the French version defined prisoners of war as being "*au pouvoir de*" the Detaining Power; but for some unknown reason, while in Article 4 this was correctly translated into English as "in the power of," in Article 7 it was translated as "into whose hands prisoners of war have fallen." *See, e.g.*, 36 Stat. 2296–97; and Deltenre 258–61.

[131] 1947 GE Report 104.

[132] Article 3, *Draft Revised Conventions* 52.

the opening sentence of Article 4A of the 1949 Convention without change. While the change of wording from "captured by the enemy" to the present phrase "who have fallen into the power of the enemy" was one of the changes adopted in order to make the 1949 Convention more inclusive,[133] and is something of an improvement, it has, as we shall see, solved some problems while creating others.

Rhetorically, "capture" implies some affirmative act by the military forces of the capturing power. On the other hand, an individual can have "fallen into the power of the enemy" by means other than capture, *e.g.*, by voluntary surrender.[134] Thus, upon the final collapse of Germany in May 1945, the United States, the United Kingdom, and France contended that the hundreds of thousands of German soldiers who thereafter passed into their custody were not entitled to prisoner-of-war status because they had not been "captured" but had voluntarily submitted themselves to Allied custody; and the term "Surrendered Enemy Personnel" (SEP) was coined[135] in order to avoid the use of the term "prisoner of war," with all of the legal implications which adhered to it.[136] The major reason for substituting the term "fallen into the power of the enemy" for the word "captured" was to preclude the use of such a subterfuge in any future international armed conflict and to ensure that military personnel who surrender,

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[133] The representative of the ICRC (Wilhelm) who participated in the deliberations of Committee II (Prisoners of War) at the 1949 Diplomatic Conference explained that "it had been suggested that the words 'fallen into enemy hands' had a wider significance than the word 'captured' which appeared in the 1929 Convention." 2A *Final Record* 237. *See also* note II-377 *infra*, and Wilhelm, Status 29. For the sake of brevity, the terms will be used interchangeably herein except where the text indicates otherwise. (While the Diplomatic Conference made the first paragraph of Article 5 conform to Article 4A, it overlooked the fact that the second paragraph of Article 5 contained the phrase "fallen into the hands of the enemy"—and that the first paragraph of Article 12 contained the phrase "in the hands of the enemy Power.")

[134] By "voluntary surrender" is meant the act of the individual who, contrary to his long-term desire, concludes that in view of the situation with which he is then confronted (national capitulation, he is separated from the armed forces to which he belongs, he is lost and weaponless, etc.), it is not possible for him to continue resistance. (The problem of deserters and defectors is discussed at pp. 76–81 *infra*.)

[135] JAGA 1946/10384, 7 January 1947. The term "disarmed personnel" was also employed. *PMG Review*, III, 226–27. The same practice was followed after the surrender of Japan. 1 ICRC *Report* 539–40.

[136] *United States v. Kaukoreit.* The distinction was discontinued in March 1946. 1 ICRC *Report* 540. In the internal armed conflict which occurred in Malaysia in the early 1950s there was a reversal of this terminology, the term "captured enemy personnel" (CEP) being used to designate individuals who had been captured and who were to be treated as criminals, and the term "surrendered enemy personnel" (SEP) being used to designate individuals who had voluntarily given themselves up and who were to be treated as prisoners of war. This was apparently intended to encourage surrenders. Miller, *The Law of War* 258–59; Brewer, Chieu Hoi 51.

even after the collapse of their country's government or military effort, will still be entitled to receive the full protection of the Convention.[137]

Having specified the event (falling into the power of the enemy) the occurrence of which would entitle certain individuals to prisoner-of-war status, it was necessary to identify in some fashion the individuals who would so qualify. This was accomplished by following the method used in predecessor conventions: the enumeration of general categories. Because so many problems are involved in determining the extent of coverage in almost every category, an individual, detailed analysis is deemed necessary.

1. Members of the Armed Forces

All of the members of the regular armed forces of a nation fall within this category.[138] The precise military elements which constitute the armed forces of a State is strictly a matter of national law.[139] Each State may, and usually will, have laws specifying the components which are included within its regular armed forces.[140] As we shall see,[141] in the next subparagraph of this Article of the Convention there are four specific requirements which must be met in order to entitle an individual within the category there dealt with to prisoner-of-war status. These four requirements, briefly stated, are: (1) having a responsible commander; (2) wearing a fixed distinctive sign; (3) carrying arms openly; and (4) operating in accordance with the laws and customs of war. This enumeration does not appear in subparagraph 1, dealing with the regular armed forces. This does not mean that mere membership in the regular armed forces will automatically entitle an individual who is captured to prisoner-of-war status if his

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[137] Draper, *Recueil* 109; Kunz, Treatment 105; Olgiati, Croix-Rouge 719; Krafft, Present Position 137–38. It will be noted that nowhere in the Convention is the term "prisoner of war" defined. Flory, Nouvelle conception 54.

[138] While subparagraph (1) of Article 4A uses the term "armed forces" and subparagraph (3) thereof uses the term "regular armed forces," this appears merely to have been bad draftsmanship, the intent of the draftsmen having been the same in both cases. And, of course, these terms include all of the uniformed services which constitute a part of the armed forces of a particular country: army, navy, air forces, marines, coast guard, frontier guards, etc. (In the United States and, perhaps, in some other countries, the word "regular" is often used to designate the professional military careerist. This is not the sense in which it is used here. The conscript, the wartime volunteer, the reservist called up for active service, and the career soldier are all members of what is here termed "regular armed forces." *See, e.g., In re Territo* 156 F2d at 146.) Article 43(1) of the 1977 Protocol I states that "[t]he armed forces of a Party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to the Party for the conduct of its subordinates." *See also* Article 43(3) thereof.

[139] Lauterpacht–Oppenheim 255. This does not mean, however, that a State may, by domestic legislation, bring otherwise unprivileged combatants within the protection of the Convention.

[140] *See, e.g.*, 10 U.S.C. §101(4); and *Swiss Manual* para. 54.

[141] *See* pp. 44–45 *infra*.

activities prior to and at the time of capture have not met these requirements.[142] The member of the regular armed forces wearing civilian clothes who is captured while in enemy territory engaged in an espionage or sabotage mission is entitled to no different treatment than that which would be received by a civilian captured under the same circumstances.[143] Any other interpretation would be unrealistic, as it would mean that the dangers inherent in serving as a spy or saboteur could be immunized merely by making the individual a member of the armed forces; and that members of the armed forces could act in a manner prohibited by other areas of the law of armed conflict and escape the penalties therefor, still being entitled to prisoner-of-war status.[144]

As long as members of the regular armed forces are in uniform there should be no problem with respect to their entitlement to prisoner-of-war status.[145] There is no legal basis whatsoever for denying

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[142] The official ICRC discussion of the Convention refers only to the need for members of the regular armed forces to comply with the requirement for a fixed distinctive sign, a requirement which is, of course, normally met by the wearing of the uniform. Pictet, *Commentary* 52. This is logical because it can be assumed that in the regular armed forces there will always be a responsible commander; that the uniformed individual may carry arms in any manner that he desires; and that if he violates the laws and customs of war he is still entitled to prisoner-of-war status even though he may be tried for war crimes. *See* note 144 *infra*. While the Delegate of the Soviet Union at the 1949 Diplomatic Conference appeared to argue that none of the four requirements was applicable to members of the armed forces (2A *Final Record* at 466), it is believed that the interpretation here given is more appropriate and much more widely accepted.

[143] Article 29, second paragraph, *1907 Hague Regulations; British Manual* para. 96; *U.S. Manual* para. 74. However, if he claims to be entitled to prisoner-of-war status he is entitled to have his claim determined by a "competent tribunal." *See* discussion of Article 5(2), pp. 55–59 *infra*. *See also Public Prosecutor v. Koi; Ali and Another v. Public Prosecutor; Krofan v. Public Prosecutor;* and *Military Prosecutor v. Kassem and Others*. For discussions of the Privy Council decisions in *Koi* and *Ali, see* Baxter, Qualifications 290; and Elman, Prisoners of War 178.

[144] A distinction must be made between a conventional war crime allegedly committed by an individual concededly within the purview of Article 4 who, under Article 85, retains prisoner-of-war status at least until convicted (*see* pp. 379–382 *infra*), and other types of offenses such as acting as a spy or saboteur while wearing civilian clothes. *Ex parte Quirin; Colepaugh v. Looney; Krofan v. Public Prosecutor*. For a further discussion of this problem *see* Draper, *Recueil* 109–10. *See also* Article 46 of the 1977 Protocol I. (It should be observed that spying, while punishable under the law of war, is not a violation of international law. *U.S. Manual* para. 77; *British Manual* para 326; *Swiss Manual* paras. 36 & 38; Baxter, Unprivileged Belligerency 333.)

[145] The *Swiss Manual* para. 55 correctly states: "In case of capture, the uniform creates a presumption that the individual wearing it belongs to the armed forces." (Trans. mine.) *See also* Article 40 of the 1973 Draft Additional Protocol. Article 46(2) of the 1977 Protocol I specifically provides that a member of the armed forces gathering information in enemy territory "shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces."

the benefits and safeguards of the Convention to acknowledged members of regular armed forces on the ground that they are guilty of making "aggressive war" and are, therefore, "war criminals," as was done by the North Vietnamese during the hostilities in Vietnam (1965–73).[146]

This subparagraph also includes "members of militias or volunteer corps forming part of such armed forces." Of course, when such troops are, by domestic law, incorporated into and made a part of the armed forces of the country, there can be no question of their entitlement to prisoner-of-war status and to the benefits and safeguards of the Convention.[147]

2. Members of Other Militias and Members of Other Volunteer Corps, Including Those of Organized Resistance Movements, Belonging to a Party to the Conflict and Operating in or outside Their Own Territory, etc.

Here we have the most complicated, most controversial, and most unintelligible provision of the Article. In an effort to clarify the provisions of this subparagraph to the maximum extent possible, it will be necessary to analyze it clause by clause, and to include in the analysis the limiting provisions which immediately follow it.

a. MEMBERS OF OTHER MILITIAS AND MEMBERS OF OTHER VOLUNTEER CORPS

When this subparagraph of Article 4 was being discussed and redrafted at the 1949 Diplomatic Conference, the representative of the United Kingdom requested that there be an independent reference to militias inasmuch as in England militias were not a part of the regular armed forces nor were they voluntary corps. As this particular problem was not mentioned again in the lengthy debate on this subparagraph which followed, it must be assumed that the United Kingdom request is the reason for the reference to militias other than those

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[146] *See* notes 142 and 144 *supra*, and notes 157 and VI–177 *infra*. Concerning the "Commissar Decree," issued by the Nazis in 1940, evidence was given to the IMT that it provided that "political commissars of the army are not recognized as prisoners of war, and are to be liquidated at the latest in the transient prisoner of war camps." *I.M.T.* 472. Under such an interpretation, reminiscent of the Religious Wars of the sixteenth and seventeenth centuries, law becomes irrelevant. Concerning the 'Commando Order," issued by Hitler in 1942, under which uniformed members of the Allied armed forces engaged in missions behind the German lines were to be dealt with summarily ("slaughtered to the last man"), another gross violation of the rights of members of the regular armed forces, *see I.M.T.* 471; *The Dostler Case;* and Kalshoven, *Reprisals* 184–93.

[147] Thus, in the United States when Reserve or National Guard units are called to active duty in the Federal service they are just as much a part of "the armed forces of a Party to the conflict" as are the regular (permanent) units. The same is true in the United Kingdom with respect to the Territorial Army, the Army Emergency Reserve, and the Home Guard. *British Manual* para. 89 n.1. *See* Jones, Status of the Home Guard in International Law, 57 *L.Q. Rev.* 212.

which form a part of the regular armed forces.[148] It presumably would be applicable to the members of any militia which is not, under national law, a part of the armed forces of the country. This will probably be a comparatively rare occurrence.

b. INCLUDING THOSE OF ORGANIZED RESISTANCE MOVEMENTS

The inclusion of this clause, and the limiting provisions which follow it, a direct result of the experiences of World War II, was considered to be a major breakthrough in enlarging the group of individuals who would, upon falling into the power of the enemy, be entitled to the status of prisoners of war.[149] It is now apparent that, considering the aforementioned limiting provisions, this attempted enlargement of the provisions of prior conventions accomplished little or nothing.

During World War II so-called resistance movements sprang up or were created within the territory of most of the countries occupied by an enemy, whether the occupation was partial or total.[150] It was with respect to the status of members of these types of resistance movements that the 1949 Diplomatic Conference was attempting to make provision.[151] However, because of a perhaps understandable reticence

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[148] The British position is stated at 2A Final Record 237. The Working Party of the Special Committee recommended the double reference to militias (*ibid.*, 414–15) and it was adopted without real debate. *Ibid.*, 467, 477–78, & 561. The ICRC errs in asserting that the captioned provision means "other than those *enlisted* in the regular army." (Emphasis added.) 1973 *Commentary* 48 n.14. *See* note 138 *supra.*

[149] The official ICRC discussion of the Convention refers to this provision as "solving one of the most difficult questions—that of partisans." Pictet, *Commentary* 49. This was a reiteration of what Committee II (Prisoners of War) of the 1949 Diplomatic Conference had said. 2A *Final Record* 561. The two statements were both overly optimistic. Baxter, Geneva Conventions 66.

[150] Of course, allies, displaced governments, and governments-in-exile continued to fight on so that in most cases there was no question of the continued existence of an international armed conflict. The situation in France, where the government in power on the ground had signed an armistice agreement while a government-in-exile, newly created, continued the conflict, was different and created a number of unusual legal problems. Pictet, *Recueil* 87–88.

[151] It is important to bear in mind that in drafting Article 4A(2) the 1949 Diplomatic Conference was concerned solely with the World War II "partisan," "guerrilla," "resistance fighter," etc.—different names for a particular category of participant in *international* armed conflict—and not at all with the so-called "freedom fighter," or "member of a national liberation movement," participants in an *internal* armed conflict, a war of independence. The Soviet Union has implicitly admitted this distinction by opting to attempt to convert wars against colonial powers into international armed conflicts. Soviet International Law 402. That many of the newly independent States see the Soviet approach as a method of helping the various groups fighting for independence was demonstrated by the discussions concerning the amendment to Article 1 of the 1973 Draft Additional Protocol adopted by Committee I at the 1974 Diplomatic Conference and approved at the Plenary Meeting of the 1977 session of the Conference as Article 1(4) of

on the part of the representatives of some countries which had not suffered occupation and who feared the possible adverse future consequences of an overly broad provision,[152] a number of limitations were introduced, limitations which, in many cases, appear to negate the possibility that members of the usual resistance group could qualify for prisoner-of-war status if they should fall into power of the enemy.

If the term "organized" was used as a method of eliminating the casual soloist, it was unnecessary, as this type of individual was already denied prisoner-of-war status because he would not be "commanded by a person responsible for his subordinates."[153] The use of the term "organized" here can, however, certainly be accepted as a justifiable excess of caution.

c. BELONGING TO A PARTY TO THE CONFLICT

Our concern throughout this treatise is, of course, with international armed conflict—armed conflict between States. It is understandable that it was considered appropriate that for individuals to receive the protection afforded by a convention regulating international armed conflict, they should be required to have some organizational connection with one of the States which is a Party to the conflict. This provision arose out of the events of World War II; but, strangely enough, it does not even provide with any degree of certainty for all of the situations which are recognizable as having occurred during that conflict. The Soviet Government could and did claim the resistance movement which operated behind German lines in the Soviet Union; the United States Government could and did claim the resistance movement which operated against the Japanese in the occupied Philippines. Each of these representative resistance movements was fighting in support

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the 1977 Protocol I. Forsythe, The 1974 Diplomatic Conference on Humanitarian Law: Some Observations, 69 *A.J.I.L.* 77; Suckow, The Development of International Humanitarian Law, *ICJ Rev.*, June 1974, at 50. *See also* 1969 Reaffirmation 101–02.

[152] The following apt statement appears in 2A *Final Record* 469: "During the course of further discussion Captain Mouton (Netherlands) said that there were two points of view: that of the Powers likely to be Occupying Powers in the event of another war (those were usually the great Powers) and the Powers whose countries were likely to be occupied (the smaller Powers). . . ."

[153] Schwarzenberger, Human Rights 252. *See also* Fooks, *Prisoners of War* 34–35. The phrase quoted in the text ("commanded by a person responsible for his subordinates"), a reiteration of one of the provisions of Article 1, *1907 Hague Regulations*, had already been included in the draft article. It is discussed at length at pp. 45–46 *infra*. The two terms, "organized" and "commanded by a person responsible for his subordinates," should be understood in the same sense. Bindschedler 41. *See also* Article 41 of the 1973 Draft Additional Protocol. This Article, with editorial changes, became Article 43(1) of the 1977 Protocol I. The relevant portion now states: "Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."

of, and with the concurrence of, a government with an army in the field and indubitably "[belonged] to a Party to the conflict." But what of the resistance movements in such countries as Norway,[154] Denmark, or the Netherlands? Is a "government-in-exile" a "Party to the conflict"?[155] And what of a situation such as that which existed in Yugoslavia where one indigenous resistance movement, which would probably have been repudiated by the government in power at the time of the occupation, fought the occupying Power, while another, which probably would have been acceptable to that government, fought the other resistance movement and supported the occupying Power? And what of the situation in Italy where, after Mussolini's downfall, an indigenous resistance movement opposed the Badoglio Government and supported the Germans? And finally, what of the situation in France where the indigenous resistance movement opposed the Government in actual power and supported the government-in-exile?[156] While none of these situations is specifically covered by the quoted provision of the Convention, each one of them, and others not mentioned, had actually occurred during the hostilities which had ended just shortly before the provision was drafted. It is not difficult to conclude that it was intended to cover each of the instances in which the indigenous re-

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[154] It is here assumed that a government such as that of Quisling in Norway during World War II was not an indigenous government but was merely a masquerade for the military government of the Occupying Power. This assumption is not made with respect to the contemporaneous Pétain Vichy Government of France.

[155] Subparagraph 4A(3) gives prisoner-of-war status to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." *See* pp. 59–60 *infra*. At the 1949 Diplomatic Conference the suggestion was made that a similar provision should be included with respect to members of organized resistance movements. 2A *Final Record* 388. No action was taken with respect to this suggestion. Such a provision was proposed anew in Article 38(1) of the 1972 Draft Additional Protocol (1972 *Basic Texts* 14–15) and in the first paragraph of Article 42 of the 1973 Draft Addition Protocol (1973 Commentary 47, 50). It is now included in Article 43(1) of the 1977 Protocol I.

[156] Article X of the 1940 *Franco-German Armistice* required the French Government to "forbid French citizens to fight against Germany in the service of States with which the German Reich is still at war" and provided (according to the unofficial English version) that those individuals who so fought would be treated as "insurgents." (The unofficial English version of Article XIV of the 1940 Franco-Italian Armistice used the term "combatants outside the law.") After the Allied landing in France in June 1944 the German commander announced that captured members of the French Forces of the Interior (FFI) would be treated as unprivileged combatants and the German army actually executed 80 of them at one time. The FFI then executed 80 members of the German army captured at Annecy. The ICRC subsequently obtained informal verbal assurances that captured members of the FFI would be treated as prisoners of war. 1 ICRC *Report*, 520–24. Kalshoven, *Reprisals* 193–97. (The examples given in the text are not intended to be exhaustive.)

sistance movement was opposing an Occupying Power; it is somewhat more difficult to establish a basis for bringing under the Convention those resistance movements which supported the invader. Can it be said that they "belonged" to a Party to the conflict? It certainly must be assumed that the governmental representatives present at the Diplomatic Conference in Geneva in 1949 were cognizant of all of these variations—but did they intend that the provisions of the Convention be applicable in all of these cases?[157] The Record of the Conference does not answer this question.

It has been mentioned above that the Soviet and United States Governments, each a Government of a State which was "a Party to the conflict," publicly acknowledged the resistance movement which was acting in its support.[158] Unfortunately, the situation is not always so clear-cut, and the Government of the Party to the conflict is not always so eager to claim or to acknowledge the relationship. In this event the relationship may be established on behalf of the resistance movement by other means, provided that at least a de facto relationship is shown.[159] However, it is extremely unlikely that the existence

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[157] One extremely distressing facet of this problem is the inordinate likelihood that in any international armed conflict in which the Soviet Union is involved, it will take the position that members of any resistance movement supporting it, or its allies, are fighting in a "just" cause and are, therefore, entitled to prisoner-of-war status; but that any such individuals supporting its adversary are "aggressors" engaged in an "unjust" war and, accordingly, are not entitled to the benefits and safeguards of the Convention. Trainin, Guerrilla Warfare 561–62; Kulski, Some Soviet Comments 349; Soviet International Law 402 & 423; Kunz, Treatment 106; U.K., *Treatment* 1 & 32; Miller, *The Law of War* 223–24 & 231. The laws of war (*ius in bello*) apply equally to both sides in all international armed conflicts, no matter how they originate. Lauterpacht–Oppenheim 218; Ford, Resistance Movements 369; SIPRI 2–3. Moreover, "crimes against peace" (the war crime of making a war of aggression) can be committed only by national policy-makers, not by individual members of the armed forces. ILC, Nürnberg Principles, para. 117; Levie, Maltreatment in Vietnam 351 n.140; SIPRI 1.

[158] Some of the other Governments took similar action. *See, e.g.*, the Royal Dutch Emergency Decree No. E62 of 5 September 1944. *See also* 11 Dept. State Bull. 263, containing a declaration of the United States concerning the Czechs fighting in occupied Czechoslovakia. Frequently, however, Governments are reluctant to acknowledge irregular combatants. *See* U.N., *Human Rights*, A/8052, para. 175. The ICRC has said that the requirement of belonging to a Party to the conflict "creates the link whereby a subject of international law can be held internationally responsible for acts carried out by members of resistance movements." 1973 *Commentary* 50.

[159] Pictet, *Commentary* 56–58. Pictet suggests that specifics such as the delivery of arms and other war supplies by the Party to the conflict to the resistance movement establish the *de facto* relationship. *Ibid.*, 57 n.1. *See also* U.N., *Human Rights*, A/8052, para. 175. A subsequent ICRC document suggested that this requirement could be met either by *de facto* liaison with a State or by obtaining "recognition by one or more States, or even by the international community." 1971 GE Documentation, VI, at 17. If the second alternative means recognition by a State other than the one to which the resistance movement allegedly "belongs," or

of even a de facto relationship would be accepted as evidence that the resistance movement "belonged" to a Party to the conflict in the face of a denial of any relationship by that Party.

The situation which was either not considered as possible by the 1949 Diplomatic Conference, or which was implicitly rejected by the Conference without discussion, was the eventuality that the claim might be put forward that individuals who are members of a group which admittedly does not belong to any Party to the conflict and which is, therefore, waging a "private war" against one of the belligerent States, are entitled to prisoner-of-war status when they fall into the power of the State against which the efforts of the group have been directed. Writers in this field have rejected such a claim;[160] and one well-reasoned opinion of an Israeli military court has specifically held that inasmuch as no Government with which Israel was in a state of war accepted responsibility for the acts of the Popular Front for the Liberation of Palestine, its members who fell into the power of the Israeli armed forces were not entitled to the benefits and safeguards of the Convention.[161]

d. OPERATING IN OR OUTSIDE THEIR OWN TERRITORY, EVEN IF THIS TERRITORY IS OCCUPIED

This is one provision of the subparagraph which liberalizes rather than limits. The usual concept of the organized resistance movement is of a group operating in home territory occupied by the enemy. Under this provision that concept is inapplicable; the group may also

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an ally thereof, this would undoubtedly be considered by many States to be an unwarranted interference in the affairs of other States. It strongly resembles the premature recognition of belligerency of another era.

[160] *See, e.g.*, Bindschedler 40; and Draper, Relationship 202. The argument has been advanced that inasmuch as the French version of Article 4A(2) uses the word "*appartenant*," it is not necessary that the resistance movement actually "belong" to a Party in the English sense of that word. Apart from the fact that the English and French versions are equally authentic, one major difficulty with that argument is that French-English dictionaries translate "*appartenir*'" as "to belong [to]; to be owned [by]." *See, e.g.*, Harrap's *New Standard French-English Dictionary, I*, at A:49 (1972). It is clear that in this instance, unlike a number of others, the French and English texts are identical.

[161] *Military Prosecutor v. Kassem*, 42 *I.L.R.* at 477–78. The correctness of that decision was demonstrated by the action of an Arab guerrilla group, the headquarters of which proudly announced to the press that it had captured an Israeli soldier during a raid into Israel and that he had been "subjected to interrogation by a special committee before he was executed." *St. Louis Post-Dispatch*, 3 October 1974, at 7A, col. 2. It does not take much imagination to interpret "interrogation by a special committee" as a euphemism for torture; and as the individual captured was a uniformed Israeli soldier taken during the course of a raid into Israel, it would be interesting to learn the alleged justification for his execution. No Arab State claimed this group—but there are those who contend that if its members are captured they are entitled to the full panoply of the protections of the Convention!

operate outside of its national territory. Probably what the draftsmen had in mind was the resistance group behind enemy lines which withdraws as the enemy withdraws so that eventually it is operating in the territory of an ally which was also occupied by the common enemy, or it is operating in the enemy's own territory. This provision does not appear to create any insoluble legal problems; but what a State will actually do when members of an organized resistance movement composed of enemy subjects fall into its power in its own territory remains to be seen.

e. THE FOUR CONDITIONS

During the Franco-Prussian War (1870–71) the Germans summarily executed as a *franc tireur* any individual found bearing arms who was not able to produce a special authorization from the French Government.[162] Article 9 of the 1874 Declaration of Brussels[163] proposed to regularize the status of these individuals by specifically granting protection to members of militia and volunteer corps who met four listed conditions.[164] These conditions were repeated in Article 1 of the 1899 Hague Regulations, in Article 1 of the 1907 Hague Regulations, and in the footnote to Article 1 of the 1929 Prisoner-of-War Convention. In the 1949 Convention the four conditions were once again included in the text itself and, in addition to being applicable, as heretofore, to members of "militias and volunteer corps," they were made applicable to members of organized resistance movements. In the modern world, it is in this latter respect that the provision assumes major importance. But it must be emphasized that in order to qualify for prisoner-of-war status, the members of an organized resistance movement must clearly fulfill each and every one of these four conditions,[165] and that most Capturing Powers will deny the benefits and

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[162] Fooks, *Prisoners of War* 34.

[163] While this Declaration, based largely on the Lieber Code (*see* note 28 *supra*), never entered into force, it has been a major source of many of the rules included in subsequent international conventions which did become effective.

[164] One noted Soviet jurist designated this decision as a victory for the "representatives of democratic states with militia systems." Trainin, Guerrilla Warfare 541. He thereafter proceeds to indicate why several of the four conditions cannot possibly be accepted for application to organized resistance movements. *Ibid.*, 555–60. However, at the 1949 Diplomatic Conference the Soviet representative strongly supported the adoption of the Stockholm draft which included the four conditions. 2A *Final Record* 242, 410, 423, 428.

[165] *Military Prosecutor v. Kassem*, 42 *I.L.R.* at 476 & 480. One author draws a distinction between those requirements for qualification for prisoner-of-war status which relate to the resistance group itself and those which relate to the individual. Bindschedler 40–44. The ICRC has now adopted this distinction, although its listing does not coincide exactly with that of Madame Bindschedler-Robert. 1973 *Commentary* 49. There is considerable merit to the drawing of this distinction—which means that in certain respects the individual's status is determined by matters over which he has little or no control. *See* text in connection with note 193 *infra*.

safeguards of the Convention to any such individual who is in any manner delinquent in compliance. It must also be emphasized that if an individual is found to have failed to meet the four conditions, this may make him an unprivileged combatant but it does not place him at the complete mercy of his captor, to do with as the captor arbitrarily determines. He is still entitled to the general protection of the law of war, which means that he may not be subjected to inhuman treatment, such as torture, and he is entitled to be tried before penal sanctions are imposed.[166]

First condition: that of being commanded by a person responsible for his subordinates. As we have already seen,[167] this condition is closely akin to the requirement that the resistance movement be one which is "organized." But exactly what is the meaning of the phrase "commanded by a person responsible for his subordinates"? Who is such a person? One interpretation is that it means "responsible to some higher authority."[168] However, it would seem equally important that the responsibility go down as well as up. In other words, there must be some commander who is giving orders to the individuals who are actually conducting belligerent operations: a commander who can expect that his orders will normally be obeyed and who can enforce some type of disciplinary action to ensure that those orders will be obeyed.[169] In the words of the ICRC, "the 'responsible leader' estab-

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[166] 1971 GE Documentation VI, at 19. In adhering to the Convention, the Provisional Revolutionary Government of the Republic of Vietnam (the Vietcong) made a reservation in which it stated that it would not recognize the "conditions" set forth in Article 4A(2) "because these conditions are not appropriate for the cases of people's wars in the world today." *Quoted in* McDowell (ed.), *Digest of United States Practice in International Law 1975*, at 812. (The adherence of the Republic of Guinea-Bissau, the former Portuguese colony of Guinea, contains an almost identical reservation.)

[167] *See* note 153 *supra*.

[168] Lauterpacht–Oppenheim 257 n.1. Article 42(1)(a) of the 1973 Draft Additional Protocol proposed changing the wording of this condition to: "that they are under a command responsible to a Party to the conflict for its subordinates." The ICRC explanation of the proposed change was that "responsibility for the acts of subordinates means that the command is answerable for them to the Party to the conflict which bears the responsibility on an international plane." 1973 *Commentary* 50. Such a provision is now included in Article 43(1) of the 1977 Protocol I. *See* note 153 *supra*.

[169] *British Manual* para. 91 n.1, advances the thesis that in order to meet the first condition the individual must be subject to "military law," apparently meaning the national statutory military code governing the conduct of members of the regular armed forces. For all practical purposes, this thesis would make Article 4A(2) an exercise in futility. In the example there referred to, the "Waffen S.S." divisions, it is stated that the S.S. organization "had its own code of rules, and courts of a kind." This appears to be just about all that can be asked of a unit which, by definition, is not a part of the regular armed forces. (Of course, in any event, no claim could be made that the "Waffen S.S." was a resistance movement. It did have some of the characteristics of an "other militia.") Article 43(1) of the

lishes a link with the subject of international law [the Party to the conflict], while constituting the guarantee of a certain order, a certain discipline ensuring respect for international law."[170] It would seem clear that this was the objective sought in the original drafting of this condition—a method of securing maximum compliance with the laws and customs of war.[171]

One major aspect of the problem of being commanded by a person responsible for his subordinates which appears to have been largely overlooked is how the member of an organized resistance movement who is captured by the armed forces of the Occupying Power establishes that he has complied with this condition and that he is, therefore, entitled to be classified as a prisoner of war. The other three conditions, as we shall see, present factual problems which can be resolved in the same manner as any other factual problem. But how does the captured individual establish, and to the satisfaction of an enemy not inclined to magnanimity, that he is a member of an organized resistance movement with a responsible commander? To name or otherwise identify his immediate commander or any other persons in the resistance movement's chain of command would, except in a few very unusual cases, spell extinction for the movement. It has frequently been argued that it is virtually impossible for captured members of an organized resistance movement to establish that they have complied with the four conditions and are entitled to prisoner-of-war status. This is certainly true of the first condition. If the members of an organized resistance movement wish to assure their entitlement to prisoner-of-war status if captured, their compliance with the second, third, and fourth conditions is not impossible—although it will very considerably reduce combat effectiveness; but to establish compliance with the first condition will make continued operations by organized resistance movements virtually impossible.[172]

Second condition: that of having a fixed distinctive sign recognizable at a distance. The objective of the original draftsmen of this provision was probably twofold: (1) to protect the members of the armed forces of the Occupying Power from treacherous attacks by apparently

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1977 Protocol I requires only that there be "an internal disciplinary system." *See* note 153 *supra*.

[170] 1971 GE Documentation, VI at 13.

[171] The word "ensuring" is frequently used (or misused) in this context. Full compliance with the laws and customs of war can never be "ensured," no matter how well trained the members of an armed force or of an organized resistance movement may be, nor how strict the discipline. Realistically, all that can be sought is maximum compliance so that violations are the exception, rather than the rule.

[172] Having called the four conditions a "victory" (*see* note 164 *supra*), Trainin asserts that the first condition is "directed against the very substance of a war of the people." Trainin, Guerrilla Warfare 558.

harmless individuals;[173] and (2) to protect innocent, truly noncombatant civilians from suffering because the actual perpetrators of a belligerent act seek to escape identification and capture by immediately merging into the general population.[174] Each of the two requirements for the distinctive sign (that it be "fixed" and that it be "recognizable at a distance") can create problems, cause disputes, and give rise to charge and countercharge.

What is meant by a "fixed" distinctive sign? Must it be sewed on or will a handkerchief tied around the arm (which can be restored to its normal use with a single tug) suffice? Does a distinctive cap, which can be quickly removed and thrown away, meet the requirement? These are but a few of the problems of application which can arise. These and many others have already arisen and had not been satisfactorily resolved when the identical terms used in the two prior Hague Conventions and in the 1929 Prisoner-of-War Convention were incorporated into Article 4A(2) of the 1949 Convention.

The ICRC has made several statements attempting to offer acceptable interpretations of the meaning of the term "fixed distinctive sign." In 1960 it stated that the sign "must be worn constantly";[175] but in 1971 it backtracked somewhat when it said that the sign must be "fixed, in the sense that the resistant should wear it throughout all the operation in which he takes part."[176] Moreover, at that same time the ICRC stated that the sign "might be an armband, a headdress, part of a uniform, etc."[177] During World War II the listed items were, on various occasions, used by resistance groups; but they were frequently removed and disposed of at crucial moments in order to enable the individual to escape being identified as a member of the resistance and as a participant in the particular belligerent act which had occasioned the search by the Occupying Power—in order to enable him "to become invisible . . . in the crowd."[178]

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[173] One author aptly states: "Thus, if a guerrilla were to disguise himself as an innocent peasant, overtake a group of soldiers, and turn around to fire on them, this would be treachery, and a violation of the laws and customs of war." Bindschedler 43–44. *See also* Lubrano 21.

[174] Another apt statement by Madame Bindschedler-Robert: "[H]e may try to become invisible in the landscape, but not in the crowd." Bindschedler 43.

[175] Pictet, *Commentary* 59. This conclusion was contrary to the opinion of the Working Party of the Special Committee at the 1949 Diplomatic Conference. 2A *Final Record* 424.

[176] 1971 GE Documentation, VI, at 11.

[177] *Ibid.*

[178] *See* note 174 *supra*. *See also* Fooks, *Prisoners of War* 36. He may legally discard the distinctive sign after the particular operation has been finally concluded. 1973 *Commentary* 51.

If this provision is to have any meaning at all,[179] it must be interpreted, or redrafted, in such a manner as to ensure that the "fixed distinctive sign" is indeed both *fixed* and *distinctive*. The candlestick maker by day may legally become the resistance fighter by night—but while he is so acting he must wear some item which will identify him as a combatant, thereby distinguishing him from the general population, and that item must be such that he cannot remove and dispose of it at the first sign of danger. A handkerchief, or rag, or armband slipped onto or loosely pinned to the sleeve does not meet this definition. An armband sewed to the sleeve, a logotype of sufficient size displayed on the clothing, a unique type of jacket—these will constitute a fixed and distinctive identifying insignia, effectively separating the combatant of the moment from the rest of the population.

The further requirement for the sign is that it be "recognizable at a distance." As long ago as 1924 Fooks said of this requirement: "The distance at which the sign must be distinguishable is vague and undetermined."[180] The ICRC has taken the, for it, rather unexpected position that the sign must be "recognizable at a distance by analogy with uniforms of the regular army."[181] Certainly, the members of few resistance groups have possessed or worn distinctive signs analogous to the uniforms of the regular armed forces, nor could they, in the vast majority of cases, be expected to do so or be able to do so. Lauterpacht goes even further than the ICRC, stating:

> . . . it is reasonable to expect that the silhouette of an irregular combatant standing against the skyline should be at once distinguishable from that of a peaceful inhabitant by the naked eye of ordinary individuals, at a distance at which the form of an individual can be determined.[182]

This appears to place a greater requirement on a member of a resistance group than is placed on members of the regular armed forces for, apart from a weapon, the skyline silhouette of a fully uniformed and helmeted soldier would not distinguish him from a peaceful inhabitant at maximum, or near-maximum, naked-eyesight distance, particularly at dusk or in the dark.

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[179] One very pithy observation concerning this condition says: "Short of prescribing colored or luminous uniforms, an air of unreality has always surrounded this particular piece of draftsmanship." Schwarzenberger, *Human Rights* 252. Another equally critical author has stated that "the requirement that combatants carry 'a fixed distinctive sign recognizable at a distance' has an exotic air when seen in conditions of 'underground' guerrilla warfare." Stone 565.

[180] Fooks, *Prisoners of War* 36. To the same effect see Schwarzenberger, Human Rights 252 and Lauterpacht–Oppenheim 257 n.2.

[181] 1969 Reaffirmation 116–17; repeated in 1971 GE Documentation, VI at 11.

[182] Lauterpacht–Oppenheim 257 n.2. For an example which, perhaps, offers some support for the Lauterpacht position, *see Military Prosecutor v. Kassem* 42 *I.L.R.* at 478.

Thus, the problems presented by the requirement of having a fixed distinctive sign recognizable at a distance appear to be such that few, if any, members of resistance groups will be able to overcome them. For this reason the thesis has been advanced that the requirement of the distinctive sign should be eliminated.[183] It has been suggested that the third condition, that of carrying arms openly, is adequate for identification purposes and that the wearing of the distinctive sign should only be required as an alternative or substitute for compliance with the third condition.[184] But weapons, like armbands, are easily disposed of when the necessity arises—and how do the armed forces of the Occupying Power identify the recent resistance fighter, identifiable only by the possession of a weapon, who, immediately upon finding himself in danger, has disposed of his weapon and has become "invisible in the crowd" among the true noncombatants who are entitled to be protected from belligerent activities, and the effects of those activities, in which they have had no part?

By Article 42(1)(b) of the 1973 Draft Additional Protocol the ICRC proposed to substitute for the second and third conditions the requirement that "they [members of organized resistance movements] distinguish themselves from the civilian population in military operations." This would seem to limit the period of required identification to the period of actual military operations, to which, in the nature of things, there does not appear to be any major objection.[185] The phrase requiring them to "distinguish themselves from the civilian population" is certainly general enough to permit interpretations which would include all possible contingencies. But therein lies its weakness. Practically every case will involve a contested factual determination,

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[183] Trainin's arguments to support this thesis (that even uniforms do not prevent surprise attacks at night by guerrillas and that "the intention and activity of guerrillas would be obvious even without a uniform") appear to miss the point completely and, in any event, are not very convincing. Trainin, *Guerrilla Warfare* 558.

[184] 1971 GE Documentation VI, at 11. In Soviet International Law 424, the position is taken that both the second and the third conditions " would place partisans at a clear disadvantage." Professor Kozhevnikov, the author of this chapter of the Soviet treatise, does not state why he believes that partisans should be given an advantage vis-a-vis the regular uniformed soldier, a result which would necessarily follow if those two conditions were completely eliminated.

[185] *See* note 178 *supra*, and pp. 53–54 *infra*, of the text. Such a provision, considerably modified, was ultimately included in Article 44(3) of the 1977 Protocol I which reads:

Article 44—Combatants and prisoners of war

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflict where, owing to the nature of the hostilities [,] an armed combatant cannot

one which will be made by the Occupying Power—and few Occupying Powers will be inclined to be magnanimous in reaching factual determinations as to the entitlement to prisoner-of-war status of individuals who have, perhaps within the hour, engaged in hit-and-run tactics that have severely hurt the Occupying Power, particularly the morale of its armed forces. Nevertheless, the proposed provision does have merit and could, to a limited extent—if reasonably applied—solve some of the problems involved in attempting to balance the protection to which captured members of organized resistance movements would be entitled with the protection to which members of the regular armed forces are entitled against the activities of illegal combatants.

Third condition: that of carrying arms openly. This is, unquestionably, the least ambiguous of the four conditions.[186] A sidearm or hand grenade or dagger concealed in the clothing does not constitute compliance with this condition.[187] A rifle or a submachine gun carried openly would constitute compliance. In each case the facts should not be particularly difficult of ascertainment nor subject to insoluble dispute.

Fourth condition: that of conducting their operations in accordance with the laws and customs of war. It would seem indisputable that if the members of organized resistance movements are to be permitted to claim the protection of the relevant laws and customs of war, they must, in turn, themselves comply with those laws and customs. Obviously, it would be of little practical avail to attempt to urge upon a

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so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

[186] 1971 GE Documentation, VI, at 13. *But see* U.N., *Human Rights*, A/8052, para. 178; and Soviet International Law 424. Article 42(1) of the 1973 Draft Additional Protocol did not include the requirement of carrying arms openly. *But see* Article 44(3) of the 1977 Protocol I, quoted in note 185 *supra*.

[187] Lauterpacht–Oppenheim 257 n.3. *See also Military Prosecutor v. Kassem*, 42 *I.L.R.* at 478–79. In Vietnam individuals who were apparently civilian noncombatants (women, children, working farmers, etc.) would approach American servicemen in seeming innocence and then suddenly toss a hand grenade at them. (*See* note 173 *supra*.) After a very few such incidents the soldiers understandably came to distrust all civilians while they were in the field and frequently took definitive action upon suspicion and without waiting to ascertain the facts. Thus, the original illegal actions taken by the guerrillas subsequently endangered the members of the civilian population who, as noncombatants, were entitled to be protected in their status. One author believes that this provision is contrary to the principle that compliance with the Convention is not based on reciprocity, Kleut, *Guerre de partisans* 103. See the reference to Article 42(1) of the 1973 Draft Additional Protocol and to Article 44(3) of the 1977 Protocol I in note 186 *supra*.

State engaged in international armed conflict that captured members of an organized resistance movement were entitled to prisoner-of-war status and to treatment in accordance with the laws and customs of war, including the 1949 Convention, even though those same resistance fighters had been conducting their operations against the armed forces of that State in complete disregard of those very laws and customs—as, for example, by killing members of the State's armed forces captured by them, thus denying the very protection which they themselves would now be seeking.[188] Moreover, if members of organized resistance movements were not held to this standard, this could even be advanced as an excuse for noncompliance with the various other provisions of this subparagraph already discussed!

Despite the weight of the foregoing arguments, the contention has at times been advanced, in an attempt to justify the elimination of this condition, that to require compliance with the laws and customs of war by resistance fighters would render it impossible for them to operate.[189] This same argument has, of course, been put forth with respect to every limitation, or attempt to place limitations, on the operations of irregular combatants. But if one side in an international armed conflict is to be permitted to operate with no restraints whatsoever on its conduct, it is inevitable that the other side will eventually do likewise—and we have then turned the calendar back many centuries to the days when international armed conflict was almost com-

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[188] Pictet, *Humanitarian Law* 105. See note 161, *supra*. Article 41(1)(c) of the 1973 Draft Additional Protocol would have required only that the "new category of prisoners of war" therein created conduct their military operations "in accordance with the Conventions and the present Protocol." Since Article 2 of that Protocol defined "Conventions" as meaning only the four 1949 Conventions, compliance with other laws and customs of war, such as those contained in the *1907 Hague Regulations*, would not have been required. This has been rectified in the 1977 Protocol I where Article 43(1) requires the enforcement of "compliance with the rules of international law applicable in armed conflict" and Article 44(2) specifies that "all combatants are obliged to comply with the rules of international law applicable in armed conflict," while Article 2(b) defines the term as meaning "the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict."

[189] *See* the arguments collected in Bindschedler 41–43 and in U.N., *Human Rights*, A/8052, para. 180. *See* note 161 *supra*. Those who advance this thesis are really concerned with the so-called freedom fighter who is engaged in armed conflict with the armed forces of a colonial power. *See* G.A. Res. 2852, 26 U.N. GAOR, Supp. 29, at 90, U.N. Doc. A/8429 (1972; and note 151 *supra*. *See also* Article 1(4) of the 1977 Protocol I. They would probably be among the strong supporters of the condition if the resistance movement were operating against them in an international armed conflict.

pletely lacking in restraints. Fortunately, there appears to be comparatively little real support for this position.[190]

One rather difficult problem can arise with respect to the fourth condition. Does violation of the laws and customs of war by one, or several, members of an organized resistance group constitute a failure to comply with the requirements of the condition and thereby disqualify all of the members of the group? Perhaps an even more difficult question is the entitlement of an individual member of an organized resistance group to prisoner-of-war status upon capture when he has himself scrupulously complied with the laws and customs of war, but the group of which he is a member has perhaps announced that it does not consider itself bound by such laws and customs and it has, in fact, admittedly violated them.

It would seem that where, as a matter of policy and official direction, the great majority of the members of an organized resistance movement conduct their operations in accordance with the laws and customs of war, there has been compliance with the fourth condition, even if there have been individual instances of violations.[191] The converse is

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[190] 1971 GE Documentation, VI, at 14 & 16; Bindschedler 41; U.N., *Human Rights*, A/8052, para. 179. The Soviet position, as set forth in Soviet International Law 423, states: 'The laws and customs of war apply not only to armies in the strict sense of the word, but also to levies, voluntary detachments, organized resistance movement [*sic*] and to partisans." Trainin's arcane statement on this matter is probably to the same effect. Trainin, Guerrilla Warfare 560. *But see* note 164 *supra*. This condition was probably the most objectionable to the Vietcong. See note 166 *supra*. Nevertheless, this condition, considerably strengthened by the Diplomatic Conference, was ultimately included in the 1977 Protocol I. *See* note 188 *supra*.

[191] The *U.S. Manual* para. 64(d) states:

> This condition is fulfilled if most of the members of the body observe the laws and customs of war, notwithstanding the fact that the individual member concerned may have committed a war crime.

See also 1971 GE Documentation, VI, at 14; and U.N., *Human Rights*, A/8052, para. 179. Article 42(2), 1973 Draft Additional Protocol, specifically provides that nonfulfillment of the conditions listed in Article 42(1) by individual members of a resistance movement does not deprive the other members of that movement of the status of prisoners of war if captured. It further provides that the particular individual who fails to fulfill those conditions would, if prosecuted, be entitled to the judical safeguards of the Convention and, even if sentenced, would retain his status as a prisoner of war. See note 197 *infra*. The Diplomatic Conference did not deem it necessary to include a provision in the 1977 Protocol I protecting the law-abiding members of the movement, probably because Article 44(1) thereof gives entitlement to prisoner-of-war status to *all* "combatants," except those who have allegedly violated the law of war prior to capture. These latter are, under Article 44(3) and (4), entitled to protections equivalent to those contained in the 1949 Convention and the 1977 Protocol I, including specifically the judicial safeguards.

not true. Inasmuch as compliance with all four of the conditions is "constitutive" in nature,[192] the failure of the organized resistance movement as a whole to meet the fourth condition makes it impossible for any of its members to qualify for prisoner-of-war status. This is one of the several instances where the individual member of an organized resistance movement has only indirect and limited control over the factors which will determine his right to prisoner-of-war status in the event that he should fall into the power of the enemy.[193]

It is believed that the foregoing discussion has demonstrated the validity of the qualms earlier expressed concerning the problems inherent in the interpretation and implementation of this aspect of Article 4 of the Convention. That the present author is not alone in questioning the possibility of a truly humanitarian interpretation and implementation of these provisions during a period of international armed conflict is obvious from the numerous works that have been written dealing with this subject, many of which have been noted.

In 1971 the ICRC concluded that "the accent should be placed on" the third and fourth conditions: carrying arms openly and operating in accordance with the laws and customs of war.[194] It then went on to say that "throughout each military operation" the guerrilla in international armed conflict must "clearly mark his status as a combatant" and that this could be done either by a distinctive sign or by carrying arms openly, the objective being to make it possible for any observer to discern immediately the fact that an individual is a combatant and not a member of the civilian population.[195]

Article 38 of the 1972 Draft Additional Protocol proposed by the ICRC was an attempt to eliminate some of the problems discussed above. It provided that the resistance movement could belong to a "government or . . . authority not recognized by the Detaining Power"; that in order to qualify, the resistance movement had to comply with the laws of armed conflict; that in conducting military operations the members of the resistance movement had to show their combatant status by displaying their arms openly or had to distinguish themselves from the civilian population by a distinctive sign or by other means;

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[192] 1971 GE Documentation, VI, at 14; Bindschedler 41. In other words, it is only by complying generally with all of the conditions that the organized resistance movement brings its members within the provisions of Article 4A(2) of the Convention. *See also* 1973 *Commentary* 51. For conduct which precludes recognition of the entire resistance movement as legal combatants, see note 161 *supra*.

[193] *See* note 165 *supra*. Other instances are the requirements that the group be organized, that it belong to a Party to the conflict, and that it have a responsible commander. The individual would still be entitled to the protection of the last paragraph of Article 5 of the Fourth Convention. Stone, *Legal Controls* 566.

[194] 1971 GE Documentation, VI, at 16. As the ICRC there notes these are the only two conditions mentioned in Article 4A(6) as requirements to qualify members of the *levée en masse* for prisoners-of-war status. *See* pp. 64–66 *infra*.

[195] *Ibid.*, 17.

that they had to be organized and to have a responsible commander; that individual violations would not forfeit the right of the other members of the resistance group to prisoner-of-war "treatment";[196] and that individuals not meeting these requirements would, as a minimum, receive the treatment provided for in Article 3 of the Convention (dealing with armed conflict not of an international character).

Finally, Article 42 of the 1973 Draft Additional Protocol proposed by the ICRC, drafted after the intervening 1973 Conference of Government Experts, while basically only a redraft of the 1972 proposal, had two major changes: the provision concerning the requirement of carrying arms openly or wearing a distinctive sign was changed to require merely "that they distinguish themselves from the civilian population in military operations"; and members of the resistance movement guilty of violating the 1949 Conventions and the Protocol were to be given the protection of the judicial guarantees of the Convention "and, even if sentenced, retain the status of prisoners of war."[197]

Neither of these proposals adequately solves many of the problems which exist with respect to the attempt to bring the members of organized resistance movements within the protection of the 1949 Convention; nor does it appear that there is much likelihood of the drafting and general acceptance of any other useful substitute for the present provisions which are, for the most part, both ambiguous and comparatively ineffective despite the fact that they have four times been adopted by the international community and now have three quarters of a century of international usage.[198]

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[196] If the word "treatment" was used as a synonym for the word "status," it was improperly used. "Prisoner-of-war treatment" is not legally the equivalent of "prisoner-of-war status." Rubin, Status of Rebels 479–80. It may be that the use here was intentional. *See* U.N., *Human Rights*, A/8781, para. 161. *See also* note 256 *infra*.

[197] The latter provision is found in Article 42(2) of the 1973 Draft Additional Protocol. Presumably, it refers to violations of Article 13, 130, etc., of the Convention, offenses which constitute conventional war crimes, and not to a failure to meet the requirements of Article 42(1) of that Protocol. 1973 *Commentary* 51–52. This provision would, then, merely reiterate the provisions of Article 85 of the Convention. If this presumption is incorrect, it was indeed a strange proposal inasmuch as those who failed to meet the requirements for qualification for prisoner-of-war status, set forth in Article 41(1) of the Protocol, and were convicted of being illegal combatants, would "retain" prisoner-of-war status! Article 44 of the 1977 Protocol I is more clearly drafted. *See* note 191 *supra*.

[198] An excellent summary of the difficulties which confront the draftsman who attempts to solve the problem just discussed is to be found in Schwarzenberger, Human Rights 253, where the author says: ". . . any proposed change of the law in the direction of relaxing any of the existing conditions of the legality of irregular armed forces and armed risings is unlikely to result in a greater protection of guerrilleros. If a belligerent must expect that in combat zones and occupied ter-

Before leaving this subject it is appropriate to point out that the probability of controversy in areas involving the identification of persons entitled to prisoner-of-war status was not overlooked by the draftsmen of the Convention. During World War II the decision that an individual was not entitled to prisoner-of-war status had frequently been made summarily and by persons of very low rank.[199] There was no formal "recognition" process as such and, concededly, for the most part no such process was required.[200] Nevertheless, the problem had arisen on occasion—and it was not difficult to foresee that a new and greatly enlarged provision on entitlement to prisoner-of-war status would correspondingly increase the number of problems arising in this area. Accordingly, the 1948 Draft Revised Convention contained a new and novel proposal which ultimately became the second paragraph of Article 5 of the 1949 Convention. That paragraph states:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[201]

Obviously, this provision serves a double purpose: (1) it prohibits the procedure sometimes followed in the past of executing first and

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ritories daytime civilians become nighttime irregulars, he is likely to cease distinguishing between genuine civilians and irregulars in civilian disguise and treat the whole of the civilian enemy population as potential—and unprivileged—belligerents.

"More likely than not, excessive permissiveness in the redrafting of the relevant rules would merely lead to total repression practiced against guerrilleros and the civilian population alike."

Moreover, as stated in Prugh, Current Initiatives 263: "They [humanitarian objectives] cannot be achieved by drafting protocols that will not stand up to the test of the battlefield, they cannot derive from conventions that few nations will sign, fewer ratify, and fewer still adhere to [i.e., comply with]."

[199] 2B *Final Record* 270; Ford, Resistance Movements 377.

[200] When he made his study of prisoners of war immediately after World War II, Feilchenfeld concluded that "there is no such thing under existing law as a formal 'recognition' of prisoners of war." Feilchenfeld, *Prisoners of War* 23. He went on to urge that "the growth of such a new institution should not be encouraged. Every captive should enjoy the treatment of a prisoner of war until he is proved otherwise." *Ibid.* The draftsmen of the 1949 Convention apparently disregarded his admonition against institutionalizing the process of recognition of prisoner-of-war status, but did adopt the suggestion that all combatants falling into the power of the enemy should be afforded the protection of the Convention until their nonentitlement is formally established.

[201] The provisions of this Article are, of course, applicable to the identification of persons allegedly falling within any of the various categories enumerated in Article 4. It is discussed at some length at this point because it is with respect to Article 4A(2) that the vast majority of cases requiring such a determination will arise.

investigating later—the individual who falls into the hands of the enemy is entitled to the protection of the Convention until the contrary is established;[202] and (2) it provides for the determination of cases involving disputes as to the entitlement of individuals to prisoner-of-war status to be made by a "competent tribunal"—without, however, indicating exactly what is meant by the term.[203]

When the *Law of Land Warfare* was issued by the United States Army in 1956, it stated that the "competent tribunal" should consist of "a board of not less than three officers."[204] Similarly, a Royal Warrant issued in 1958 included *Prisoner of War Determination of Status Regulations* which provide that in the British army the determination of the entitlement to prisoner-of-war status in questionable cases will be made by a "board of inquiry."[205] Neither of these provisions had

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[202] In legal jargon it would be said that there is a presumption of entitlement to prisoner-of-war status subject to rebuttal by the Detaining Power. While there is no indication as to where the ultimate burden of proof is placed, it would probably be on the individual inasmuch as he is advancing the claim to a privileged status. *See Public Prosecutor v. Koi,* [1968] A.C. at 855. *But see* Baxter, Qualifications 293–94. Article 45(1) of the 1977 Protocol I provides that a person who has participated in hostilities and who has fallen into the power of the enemy "shall be presumed to be a prisoner of war" and, therefore, entitled to the protection of the 1949 Convention, "if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf." It further provides that if there is doubt as to his entitlement, he shall continue to have prisoner-of-war status until his actual status has been determined by a "competent tribunal." (*See* note 203 *infra.*) Article 45(2) of the Protocol provides that the decision as to entitlement to prisoner-of-war status shall be made by a "judicial tribunal" and that "[w]henever possible . . . this adjudication shall occur before the trial for the offence." (*But see* note 216 *infra.*)

[203] The provision first appeared as Article 4 of the *Draft Revised Convention* submitted by the ICRC to the 1948 Stockholm Conference (*Draft Revised Conventions* 55: "some responsible authority") and was there approved with minor editing (Revised Draft Conventions 53–54: " a responsible authority"). At the 1949 Diplomatic Conference the wording moved to "by military tribunal or by a competent military authority with officer's rank" (2A *Final Record* 480), to "military tribunal" (*ibid.*), to "competent tribunal" (2B *Final Record* 270–72). It is clear that the term "competent tribunal" was not intended to limit jurisdiction to make the decision to the "regular" courts (2A *Final Record* 563). Conversely, there is no reason to believe that a regular civilian court would not constitute a "competent tribunal."

[204] *U.S. Manual* para. 71(c). Note that the burden is placed on the individual to assert that he is entitled to prisoner-of-war status in order to activate the procedure. *Public Prosecutor v. Koi,* [1968] A.C. at 855, 859. *See* note 202 *supra.* The *U.S. Manual* further provides [in para. 71(d)] that if a board's decision is against entitlement to prisoner-of-war status, the individuals concerned still "may not be executed, imprisoned, or otherwise penalized without further judicial proceedings to determine what acts they have committed and what penalty should be imposed therefor."

[205] *British Manual,* Appendix XXVII, First Schedule. The constitution and procedeure of a "board of inquiry" is governed by the Army Act, 1955, and by the Rules issued thereunder.

ever been implemented or applied, and no reported use had been found for the provisions of the second paragraph of Article 5, during most of the international armed conflicts which have occurred since 1949.[206] It was only in Vietnam, with its large-scale irregular warfare, that the problem assumed Homeric proportions which required the implementation and application of the above-quoted provisions. As early as May 1966, the United States Army reacted to the problem of the need to have a formalized procedure for deciding the doubtful cases of entitlement to prisoner-of-war status of individuals captured by its forces. It issued a directive on the subject[207] which was probably the first one issued by any armed force fully implementing the provisions of the second paragraph of Article 5.[208]

Briefly stated, the directive provided that when a detained person had committed a belligerent act and it was doubtful that he was entitled to prisoner-of-war status, or it had been determined informally that he was not so entitled and he disputed this determination, his case would be referred to an "Article 5 tribunal";[209] the tribunal was to consist of three or more officers who should be, and at least one of whom was required to be, military lawyers;[210] the tribunal was directed to conduct a hearing in accordance with the procedure therein specified at which the person whose status was in question had a right to counsel;[211] and the tribunal had to reach a decision as to entitlement or nonentitlement to prisoner-of-war status, a decision of entitlement being final, but a decision of nonentitlement being subject to legal review and an order for a rehearing or an administrative grant of

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[206] Few disputes concerning the identity of individuals entitled to prisoner-of-war status occurred during the several Middle East armed conflicts or in the several Indo-Pakistani armed conflicts. In fact, in the armed conflict between India and Pakistan which occurred in 1971, some thousands of individual Pakistanis were categorized as prisoners of war who obviously did not fall within that classification. Levie, Indo-Pakistani Agreement 95 n.6. Even in Korea the problem was relatively minor.

[207] United States Military Assistance Command, Vietnam (MACV), Directive 20-5, 17 May 1966, Prisoners of War–Determination of Status. This directive was subsequently refined and reissued on several occasions. The version to which reference will be made herein is that of 15 March 1968 which is reproduced in part at 62 *A.J.I.L.* 768.

[208] In *Military Prosecutor v. Kassem*, decided in 1969, the Israeli Military Court said (42 *I.L.R.* at 472): "We do not know whether a 'competent tribunal,' within the meaning of Article 5, has been set up in any part of the civilized world either under the Geneva Convention or any other international agreement." At that time the United States Army directive being used in Vietnam was almost three years old, had been redrafted and reissued on at least two occasions in the process of its refinement based on experience, and had probably been applied in a substantial number of cases. Unfortunately, it had received very little publicity.

[209] MACV Directive 20-5, 15 March 1968, para. 5f.

[210] *Ibid.*, para. 6e(1) and Annex A, para. 3.

[211] *Ibid.*, Annex A, particularly paras. 8 & 9.

prisoner-of-war status by the commanding general.[212] (This directive has been set forth in some detail because of the fact that it undoubtedly broke new ground in the area of the determination of the entitlement of a particular individual to prisoner-of-war status. Of course, the value of such a directive depends largely upon the spirit in which it is applied. In this respect, unfortunately, little information appears to be available.)[213]

Several proposals have been made with respect to the "judicial" determinations of entitlement to prisoner-of-war status. Thus, it has been suggested that any international agency created for the purpose of ensuring the protection of human rights in armed conflicts could also perform the functions of the "competent tribunal" of Article 5;[214] and it has also been suggested that the determinations could be made by the use of a writ to a proposed "Special Tribunal of World Habeas Corpus."[215] Neither of these suggestions appears to be of a nature which would be acceptable to States. It does appear, however, that when the "competent tribunal," however established, finds against entitlement to prisoner-of-war status, there should be a required review procedure, even if it is no more than review of the file by a senior commander, or even by a specifically designated senior member of his staff. The membership of the tribunals will, in all probability, frequently include lower echelon and low-ranking combat officers who, understandably, will not be overly inclined to be generous towards a recent enemy. By requiring review by a senior commander of decisions

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[212] *Ibid.*, para. 6g. The directive also provided for the reference to a tribunal of all cases in which an original informal classification as a prisoner of war was later challenged by the authorities of the Republic of Vietnam, the Power to whom custody had been transferred under Article 12 of the Convention, and the individual concerned claimed that he had been properly classified. *Ibid.*, Annex E. *See* Haight, *Shadow War* 49.

[213] The subject has not been mentioned in any of the Annual Reports of the ICRC issued during the relevant period. According to one author the ICRC Delegate in Saigon was highly complimentary of this and a parallel directive [United States Military Assistance Command, Vietnam (MACV)], Directive 381–46, 27 December 1967, Military Intelligence: Combined Screening of Detainees). *See* Haight, Shadow War 47.

[214] U.N., *Human Rights*, A/8052, para. 116. It has also been suggested that there should be a right of appeal to an international body when there has been an adverse decision made under proposed Article 42 of the 1973 Draft Additional Protocol. *See* para. 8(b) of the 1973 NGO Memorandum. (There is no indication in this Memorandum that the draftsmen were aware of the existence of the provisions of the last paragraph of Article 5 of the Convention.)

[215] Kutner, World Habeas Corpus 744. It seems extremely unlikely that the very States with respect to which the need for third-party decision would be most compelling would ever become parties to a treaty creating an individual right of habeas corpus to an international tribunal. *But see* the McDougal & Reisman Working Document, "Establishing a Convention for World Writ of Habeas Corpus and Regional Courts of World Habeas Corpus."

adverse to the individual, there would be more assurance that a proper decision had been reached, while at the same time avoiding a procedure that would be completely unacceptable to many States—intervention on an international basis.[216] Of course, the individual would retain the protection of the Convention until any adverse decision had been finally approved by the reviewing authority.

3. Members of Regular Armed Forces Who Profess Allegiance to a Government or an Authority Not Recognized by the Detaining Power

Once again the 1949 Diplomatic Conference was attempting to supply a rule which would cover situations which had caused numerous problems during World War II with its many "governments-in-exile" and, not infrequently, with competing such governments.[217] In June 1944 the French Provisional Government, then located in Algiers, sought, through the ICRC, to ensure that prisoner-of-war status would be accorded to captured members of the "French Forces of the Interior" (FFI) fighting in occupied France in support of the Allied landing in Normandy. It was contended, and apparently not disputed, that these forces and their members conformed fully to the four conditions of the 1907 Hague Regulations and, thus, to Article 1 of the 1929 Prisoner-of-War Convention. The German Government replied to the ICRC that "it has no knowledge of the existence of any Provisional Government at Algiers."[218] As such problems multiplied, the ICRC addressed a note to all of the belligerent States in which it said, in part, with respect to the entitlement to prisoner-of-war status of all persons who fell into enemy hands and who had complied with the four conditions:

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[216] It will be recalled that the MACV directive provided for the type of review suggested herein. *See* text in connection with note 212 *supra*. Article 45(2) of the 1977 Protocol I requires that "whenever possible" the adjudication of entitlement to prisoner-of-war status by the "judicial tribunal" should take place prior to the trial for the offense and, normally, in the presence of the Protecting Power. See note 202 *supra*. There is no provision for review of the decision on status. It is believed that the adjudication of entitlement of prisoner-of-war status will, not infrequently, have to be made by the court to which a case has been referred for trial of the substantive offense. This was the procedure followed in such cases as *Public Prosecutor v. Koi; Ali and Another v. Public Prosecutor; Military Prosecutor v. Kassem and Others;* etc.

[217] *See, e.g.*, 1 ICRC *Report* 525 n.1.

[218] *Ibid.*, 522. *See* note 156 *supra*. (While that particular episode involved the status of members of a resistance group, rather than of the regular armed forces, it is indicative of the problems which occur when a government participating in an international armed conflict is not recognized by the enemy Power.) Pictet says that the ICRC was successful in obtaining prisoner-of-war status for captured members of the uniformed de Gaulle armed forces in Africa and in Italy and for captured members of the regular Italian armed forces who fought the Germans under Badoglio after the 1943 Armistice. Pictet, *Humanitarian Law* 101.

> The International Committee are of [the] opinion that the principles stated must be applied, irrespective of all juridical arguments as to the recognition of the belligerent status of the authority to whom the combatants concerned belong.[219]

The opinion so expressed became the basis for Article 3(2) of the Draft Revised Convention submitted by the ICRC to the 1948 Stockholm Conference[220] which, with one major change, became Article 4A(3) of the 1949 Convention.[221]

There is little question but that in such cases as the uniformed forces of the Danes, Dutch, French, Poles, etc., who continued to fight the Germans after the original defeats, each did profess allegiance to a "government" and, moreover, to a government which was not recognized by the Germans.[222] But what is the meaning of the term "authority"? Apparently, it was intended to cover such contingencies as a goverment which had ceased to exist and had not been replaced, even by a "government-in-exile."[223]

One very interesting problem with respect to this provision has already been the subject of official discussion. Does the provision preclude trials for treason under domestic law where the individual has fought in support of a government installed in a country by the Occupying Power? The Nordic Experts, no doubt concerned about future Quisling governments which might recruit forces to fight on behalf of the enemy, answered this question in the negative.[224]

4. Persons Who Accompany the Armed Forces without Actually Being Members Thereof

Article 13 of the 1907 Hague Regulations provided that certain individuals who followed the armed forces without directly belonging to it ("such as newspaper correspondents and reporters, sutlers and contractors") and who fell into the hands of the enemy, were to be treated as prisoners of war *provided they were in possession of a certificate from the military authorities of the army which they were accompanying.* This article was carried over into Article 81 of the 1929 Geneva Prisoner-of-War Convention.[225] Subsequently, with an

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[219] 1 ICRC *Report*, 518.

[220] *Draft Revised Conventions* 52.

[221] The original draft article contained a final clause which read "particularly if they act in liaison with the armed forces of one of the Parties to the conflict." *Ibid.* This clause was eliminated at Stockholm. Revised Draft Conventions 52. *See also* the comment contained in note 155 *supra.*

[222] It has been suggested that "there must be some recognition by third States." Draper, *Recueil* 114.

[223] 2A *Final Record* 415.

[224] Nordic Experts 166.

[225] The French (official) versions of the 1907 Regulations and of the 1929 Articles are substantially identical except for verb tense.

enlargement of the enumeration of categories and some other changes, this became Article 4A(4) of the 1949 Convention.[226]

The first of three additions to the enumeration of categories was "civilian members of military aircraft crews." This was, of course, a new phenomenon and one which was considered to include a sufficient number of individuals to warrant special mention.[227] The second addition to the enumeration of categories was "members of labour units." During World War II questions arose, for example, concerning the status of civilians captured while working for the German *Organisation Todt* in France.[228] It was apparently this type of individual for whom the added protection of specific reference was intended. And the third addition to the enumeration of categories was members of "services responsible for the welfare of the armed forces," Presumably this category would include entertainers,[229] civilian ambulance drivers,[230] and the like—individuals who are either temporarily or permanently concerned with the well-being of the troops.[231] (As a result of events in Vietnam, where a number of war correspondents covering that conflict were captured by the Vietcong and were then killed, or were captured by them and then disappeared, efforts were initiated to give members of the press exceptional protections, beyond that of prisoners of war.[232] Inasmuch as the Vietcong refused to apply the 1949 Convention, it is doubtful that the existence of any such new provision would have changed the course of events.)

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[226] Apart from minor editorial changes, the paragraph adopted by the 1949 Diplomatic Conference was that adopted the year before at Stockholm. Revised Draft Conventions 52. A British proposal, which was not adopted, would have completely eliminated the enumeration of categories. 3 *Final Record* 60–61 (Annex 90).

[227] The Finnish representative proposed to eliminate the mention of this category on the ground that "civilians had no place in military aviation." 2A *Final Record* 417. He was dissuaded by arguments which the Rapporteur did not consider it necessary to include in the record. *Ibid.*

[228] *See* Lewis & Mewha 214.

[229] For example, individuals brought into the combat area to entertain the troops by such entities as the United Services Organization (USO), an American organization.

[230] For example, the American Field Service of World War I and the Friends Field Service of World War II.

[231] In the past, some armies have provided prostitutes for their combat forces. Presumably, these ladies would fall within the compass of the provision under discussion.

[232] *See, e.g., Protection of Journalists on Dangerous Missions in Areas of Armed Conflict,*, G.A. Res. 3058, 28 U.N. GAOR, Supp. 30, at 73, U.N. Doc. A/9030 (1974). *See also*, Pilloud, Protection of Journalists on Dangerous Missions in Areas of Armed Conflict, 11 *I.R.R.C.* 3 (1971). Article 79 and Annex II of the 1977 Protocol I are concerned with journalists. They appear to have added little to the provisions of Article 4A(4) of the 1949 Convention.

The problem presented by this provision for entitlement to prisoner-of-war status is not so much who falls within its provisions as how this fact is established. Each successive convention has included a proviso concerning identifying matter to be issued to these individuals by the armed force which they accompany.[233] A subtle change has, however, now been introduced into the language used. The 1929 Convention and its predecessor gave prisoner-of-war status to persons within the enumerated categories of civilians accompanying the army "provided they are *in possession of* a certificate from the military authorities." (Emphasis added.) Possession of the identity card was, then, a *sine qua non* to entitlement to prisoner-of-war status. What of the individual who has had such a certificate issued to him but who, for some reason, perhaps beyond his control, is no longer in possession thereof?[234] The Stockholm Draft made no change in the 1929 Convention.[235] At the 1949 Diplomatic Conference the suggestion was made that the wording be changed so that an individual who had been issued a card but who no longer had it in his possession would not thereby be deprived of the protection of the Convention.[236] The ICRC representative pointed out that the Stockholm Draft continued to make the actual possession of the official identification card mandatory for entitlement to prisoner-of-war status;[237] and he later proposed an amendment to the paragraph which, it was agreed, established that if, in the absence of an identity card, the individual could prove that such a card had in fact been issued to him, this, too, would suffice to entitle him to prisoner-of-war status.[238] This proposal, with some editorial changes, was adopted.[239] Thus, the status of the civilian accompanying the armed forces is no longer dependent entirely upon the actual possession of an identity card issued to him by the military authorities of the armed force which he is accompanying; it is now dependent upon proof that he had received authorization from the military authorities to accompany that armed force—and that proof may consist of an identity card itself, or of some other evidence.

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[233] The provision of the 1949 Convention goes a step further than heretofore by specifying that the identity card issued shall be "similar" to the model set forth in Annex IVA of the Convention.

[234] During World War II it was not uncommon for the capturing troops to take custody of identity cards along with all other documents in the possession of captured individuals and this procedure can undoubtedly be expected in any future international armed conflict. For an analogous problem which reached gargantuan proportions, *see* note III-29 *infra*.

[235] Revised Draft Conventions 52. The suggestion for change had been made and rejected. 1947 GE Report 113.

[236] 2A *Final Record* 238.

[237] *Ibid.*, 250.

[238] *Ibid.*, 416–18.

[239] *Ibid.*, 389.

5. Member of Crews . . . of the Merchant Marine and the Crews of Civil Aircraft of the Parties to the Conflict, Who Do Not Benefit by more Favorable Treatment under Any Other Provisions of International Law

Chapter III (Articles 5–8) of the Eleventh Hague Convention of 1907 provided that when a merchant vessel of a belligerent was captured, the members of its crew who were enemy nationals were not to be made prisoners of war but were to be released upon making a formal promise not to undertake services connected with the operations of war. This provision proved ineffective during World War I, and at the Diplomatic Conference which drafted the 1929 Geneva Prisoner-of-War Convention a proposal was made that the crews of captured enemy merchant vessels be considered to be prisoners of war. The proposal met with such a clear-cut rejection that a Conference report went to the extreme of including a negative—pointing out specifically that the crews of captured enemy merchant vessels were *not* included within the term "prisoners of war."[240] During World War II the provisions of the Eleventh Hague Convention of 1907 were again completely disregarded,[241] with the result that there was no assurance as to exactly what the status of a captured merchant seaman would be.[242] In order to remedy this situation, it is now specifically provided that merchant seamen will be prisoners of war. This applies to all members of the crew, officers and men. It also applies to the crews of civil aircraft, a category which was no doubt included because civil aircraft are more and more frequently used instead of merchant cargo vessels for quick deliveries to the combat area, and the position of the two types of crews is, so far as relevant, identical. It should also be noted that for the members of the crew to be entitled to prisoner-of-war status upon capture, the merchant vessel or civilian aircraft must fly the flag of a Party to the conflict.[243]

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[240] 1 ICRC *Report* 552; Scott, *Reports* 737.

[241] Perhaps because of the *si omnes* clause (2A *Final Record* 419), but more probably because it was not in the national interests of the Powers concerned.

[242] 1947 GE Report 110–11; de La Pradelle, *Nouvelles conventions* 46.

[243] During the 1971 Indo-Pakistani hostilities neither government granted prisoner-of-war status to the captured members of the crews of enemy merchant vessels. ICRC *Annual Report*, 1972, at 50. Article 4A(5) even contemplates the possibility that these crew members may "benefit by more favorable treatment [than that to which they would be entitled as prisoners of war] under. . .other provisions of international law." In the light of actual State practice during two World Wars, this appears extremely unlikely. Yingling & Ginnane 405.

6. Inhabitants of a Nonoccupied Territory, Who . . . Spontaneously Take Up Arms to Resist the Invading Forces . . . Provided They Carry Arms Openly and Respect the Laws and Customs of War

This is the so-called *levée en masse*[244] which first attained widespread attention in modern warfare in the Franco-Prussian War (1870–71), when many members of the civilian population of France rose up spontaneously to oppose the advance of the invading Prussian army.[245] It has been given institutional status by Article 10 of the unratified Declaration of Brussels of 1874 and by every convention on the law of land warfare which was subsequently adopted,[246] even though it has, as a practical matter, probably disappeared as a phenomenon of modern warfare.[247] However, because it has been included in the Convention and because historical incidents do have a way of recurring, it is deemed appropriate to mention some of the problems raised by this provision.

The paragraph begins with the clause "inhabitants of a *non-occupied* territory" (emphasis added), a specification used originally in the 1874 Declaration of Brussels and since maintained. It is a logical provision which, in effect, properly distinguishes between the attempt of the civilian population in unoccupied national territory to resist the forward movement into, and the occupation of, the homeland by the enemy army [the *levée en masse* of Article 4A(6)] and the opposition mounted by the civilian population to the enemy army which has already occupied some or all of the national territory [the organ-

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[244] There appears to be no well-recognized English translation of this term. "Mass levy" does not have the nuances of the French term. Lauterpacht calls it a "levy *en masse*," an unsatisfactory half-solution. Lauterpacht–Oppenheim 257. For discussions of the *levée en masse*, see Greenspan, *Modern Law* 62–64; Flory, *Prisoners of War* 31–33.

[245] The Prussian army treated these members of the French civilian population as *francs tireurs* (another untranslatable term), as illegal combatants, and summarily executed those who did not possess documentary identification from the French Government. *See* text in connection with note 162 *supra*. *But see Lieber's Code*, Article 51 and 52.

[246] Article 2, 1899 *Hague Regulations;* Article 2, 1907 *Hague Regulations;* note to Article 1, 1929 Prisoner-of-War Convention; and the captioned provision of the 1949 Convention.

[247] 2A *Final Record* 239; 1947 GE Report 107. This appears to be one of those cases where the draftsmen were not making law on the basis of the last previous war, as they are usually accused of doing, but on the basis of a war several times removed! (However, the *levée en masse* may have occurred in Crete during World War II. *Swiss Manual* para. 61n.)

ized resistance movement of Article 4A(2)].[248] It is clear that the *levée en masse* can, by definition, legally exist only in territory not yet occupied.[249]

The paragraph continues with a requirement that the action of the civilian population be "spontaneous." Lauterpacht includes under the term *levée en masse* the situation which exists when a belligerent "calls the whole population of the country to arms."[250] This is very probably the origin of the term itself, inasmuch as the word *levée* implies an act by a qualified authority; but whatever it may have meant originally, under the provision of the Convention spontaneity of action by the members of the civilian population (the "inhabitants") is required in order to bring captured individuals within the coverage of the Convention.

The "four conditions" required in order to qualify captured members of organized resistance movements for prisoner-of-war status have already been discussed at length.[251] Here, logically, only the third (carrying arms openly) and the fourth (respect for the laws and customs of war) conditions are imposed as requirements for the qualification of a captured member of the *levée en masse* for prisoner-of-war status.[252]

A *levée en masse* will, as the very term itself indicates, be a mass action by a substantial part of the civilian population in the area which the enemy army is approaching. Under the circumstances, the advancing army will have no way of identifying specific individuals as being,

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[248] *British Manual* para. 97. A proposal to do away with the distinction was specifically rejected at the 1949 Diplomatic Conference. 2A *Final Record* 421–22 & 435. The *British Manual* para. 89 n.8(a), appears to suggest a third possibility: the "spontaneous" organization of the civilian population and its attack on the occupying armed forces in conjunction with the advance of the national armed forces seeking to drive the enemy out of the homeland. This seems to resemble quite closely one of the major activities of any organized resistance movement operating against the Occupying Power.

[249] U.N., *Human Rights*, A/7720, para. 87. Soviet International Law (at 423) lumps the two situations together. This could be an intentional effort to obfuscate which will permit the Soviet Union to justify advancing one contention if confronted again with a situation such as that of 1941–44 (enemy troops occupying Soviet territory), and the opposite contention if confronted with a situation such as that of 1945 (Soviet troops in enemy territory). Miller, *The Law of War* 223.

[250] Lauterpacht–Oppenheim 257. This is what the Prussian Government did to resist Napoleon in 1813. Flory, *Prisoners of War* 31. However, this interpretation was specifically rejected at the 1949 Diplomatic Conference. 2A *Final Record*, 420–21.

[251] *See* pp. 44–54 *supra*.

[252] *British Manual* paras. 89(iii) & 97. For some inexplicable reason Lauterpacht has substituted the requirement of "some organization" for the requirement of carrying arms openly. Lauterpacht–Oppenheim 257. The substitution is particularly inappropriate because the Convention provision itself specifically includes reference to the fact that the inhabitants must have acted "without having had time to form themselves into regular armed units."

or not being, a part of the *levée en masse*. It will, therefore, in all probability, in its own defense, consider all of the inhabitants of the area as being included in the *levée en masse*[253] and make prisoners of war of all such inhabitants whom it captures, thereafter denying prisoner-of-war status to those who, it determines, have failed to meet the requirements of the provision of the Convention.[254] A number of statements have been made to the effect that the enemy army would be justified in treating "all the males of military age as prisoners of war."[255] Under modern conditions, with women serving in the armed forces of a great many countries and otherwise demonstrating that they are competent and willing to handle a rifle or a grenade as expertly as the male, it is extremely unlikely that the suggested action on the part of the enemy army would be limited to the men of the area involved.

It was believed that two other general categories of individuals warranted specific coverage in the Convention in order to eliminate some of the obviously unjust actions which had been taken during World War II. These two categories are dealt with in Article 4B(1) and (2).[256]

7. Members of the Armed Forces of an Occupied Country

During World War II the German armed forces occupied, wholly or in part, a substantial number of the States of continental Europe. In many such cases, the military personnel of the occupied country who had been captured or who had surrendered were released from custody and converted to civilian status ("demobilized") by the Germans. Thereafter they were not considered to be entitled to the benefits and safeguards of the provisions of the 1929 Prisoner-of-War

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[253] *British Manual* para. 99.

[254] The determination would, of course, have to be made in accordance with the provisions of the second paragraph of Article 5, discussed at pp. 55–59 *supra*. If the determination is against prisoner-of-war status, the individual concerned would usually fall within the provisions of Article 4 of the Fourth Convention and would be entitled to the protection of that Convention, subject, of course, to the right of the Occupying Power to try him for illegal acts of belligerency.

[255] *British Manual* para. 100; *U.S. Manual* para. 65; Greenspan, *Modern Law* 63.

[256] It is interesting to note that while paragraph A of Article 4 opens with the sentence "[p]risoners of war. . .are persons belonging to one of the following categories. . .," paragraph B opens with the statement "[t]he following shall likewise *be treated* as prisoners of war. . . ." (Emphasis added.) *See* note 196 *supra*. The ICRC representative at the discussion of this article at the 1949 Diplomatic Conference (Wilhelm) indicated that paragraphs A and B dealt respectively "with prisoners of war and with persons assimilated to prisoners of war." 2A *Final Record* 436.

Convention, even if they were again taken into custody.[257] If they attempted to escape to England to join the forces of their government-in-exile and were caught, they were severely punished, although as prisoners of war they would have been subject only to disciplinary punishment for "attempted escape."[258]

At the 1949 Diplomatic Conference the Soviet representative raised a question with respect to this procedure which, unfortunately, he did not put in the form of an amendment to be added to the provision then under discussion. He questioned whether an Occupying Power has the legal authority to "demobilize" the members of the armed forces of the occupied State, or whether all that the Occupying Power could do was to release prisoners of war from its custody without changing their legal status.[259] Clearly, as he indicated, only the government of a State can change the status of members of its own armed forces. If an Occupying Power (or any other Detaining Power) releases prisoners of war from custody, this does not change their juridical status as members of the regular armed forces of their country; and if they are subsequently taken back into custody by the Occupying Power, they would once again be prisoners of war.[260] A formal acknowledgment of the foregoing in the Convention could only have helped to clarify the matter.

What the 1949 Diplomatic Conference did approve was a paragraph [Article 4B(1)] granting prisoner-of-war treatment to members of the armed forces of an occupied country who, *while hostilities continue outside of the occupied territory*: (1) are released by the Occupying Power and then are subsequently interned; or (2) are unsuccessful in an attempt to rejoin the armed forces to which they belong; or (3) fail to respond to a recall order of the Occupying Power, the purpose of which is to take them into custody. It is important to bear in mind that the foregoing provisions explicitly contemplate that the government of the unoccupied part of the territory of the State the members of whose armed forces are in question, or that State's allies if it has been completely occupied, are continuing the hostilities. The mere ex-

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[257] *Ibid.* 431; *British Manual* para. 125 n.1. *See German Regulations*, No. 15, para. 116, which stated: "These persons are 'internees', regardless of whether they have previously belonged to the enemy armed forces, and include, for instance, *released* prisoners of war." (Emphasis in original.)

[258] Article 54 of the 1929 Convention. *See In re Siebers*, 17 *I.L.R.* at 399–400. For a discussion of the comparable provision of the 1949 Convention, see pp. 405–407 *infra*.

[259] 2A *Final Record* 432.

[260] Of course, frequently this would be academic because the Occupying Power could certainly exert sufficient pressure on an indigenous government (such as the Vichy Government in France or the Quisling Government in Norway during World War II) or on a Chief of State in its custody (such as Leopold of Belgium during World War II) to obtain an order of demobilization.

istence of a government-in-exile after the complete cessation of hostilities would not suffice to make the provision applicable. In other words, this provision was not intended to apply to the situation which arises when the capitulation of a State is followed by the complete termination of armed hostilities.[261] It was apparently felt that this latter situation was adequately covered by the first paragraphs of Articles 5 and 118, the former making the Convention applicable "from the time they [covered personnel] fall into the power of the enemy and until their final release and repatriation,"[262] and the latter requiring that prisoners of war "be released and repatriated without delay after the cessation of hostilities."[263]

8. Members of Belligerent Armed Forces in Neutral or Non-belligerent Countries

The Fifth Hague Convention of 1907 contains provisions establishing the rights and duties of a neutral State with respect to members of the armed forces of a belligerent (Article 11–13), or the sick and wounded of the armed forces of a belligerent (Articles 14–15), who enter its territory during the course of the hostilities.[264] Article 4B(2) supplements those provisions, once again attempting to provide specific solutions for problems that arose during World War II.

Under general principles of international law, a neutral Power has no obligation to give asylum to troops attempting to enter its territory in order to avoid capture by the enemy, or to individuals who have escaped from prisoner-of-war camps and who attempt to enter its territory either as a place of refuge or as a lap in the route back home.[265] Under Article 11 of the Fifth Hague Convention of 1907 the

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[261] The provision would, therefore, not apply in a situation such as that which existed upon the capitulation of Japan in 1945.

[262] Were it not for the provisions of Article 4B(1), an Occupying Power that released members of the armed forces of an occupied State from custody in the territory of their own country might well have contended that this was a "final" release pursuant to the first paragraph of Article 5 and that the individuals so "released and repatriated" were not thereafter entitled to the benefits and safeguards of the Convention even if again taken into custody.

[263] Yingling & Ginnane 405–06. For unstated reasons, the United States representative unsuccessfully proposed the elimination of Article 4B(1). 2A *Final Record* 431–32.

[264] Article 15 of the Fifth Hague Convention of 1907 refers to "[t]he Geneva Convention." This reference was to the 1906 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field*, later replaced by the 1929 Convention of the same name and, still later, by the First Convention of 1949.

[265] When World War II ended, the Swiss Government closed its borders to escaped prisoners of war, while the Spanish Government admitted them. 1, ICRC *Report* 564–65. Each Government was completely within its rights in acting as it did.

neutral Power has an obligation to intern individuals falling within the first class mentioned immediately above when it does permit them to enter its territory.[266] Under Article 13 of that same Convention, the neutral Power must leave at liberty individuals falling within the second class mentioned immediately above when it does permit them to enter its territory, although it may assign them a place of residence.[267] Article 4B(2) of the 1949 Convention only relates to the first class of individuals, as it specifies that it applies to the persons falling within the provisions of the overall Article 4 who are permitted to enter the neutral territory "and whom these Powers are required to intern under international law."[268] It provides that individuals so interned shall be "treated" as prisoners of war under the Convention, certain specifically enumerated provisions thereof being excepted.[269] These excepted provisions include Articles 8 (Protecting Powers), 10 (Substitutes for Protecting Powers), 15 (Maintenance), 30 (Medical Attention),[270] 58–67 (Financial Resources of Prisoners of War), 92 (Unsuccessful Escape),[271] and 126 (Supervision).[272]

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[266] This was a custom which was merely codified in the 1907 Convention. *See, e.g.*, von Moltke, *The Franco-German War of 1870-71* at 398–99; and Howard, *The Franco-Prussian War* 430–31 & 431 n.2. During the course of World War II well over 100,000 members of various belligerent armed forces were interned in neutral States. 1 ICRC *Report*, 557. Perrot, L'internment en Suisse (*1940–1941*), 23 *R.I.C.R.* 132.

[267] *See* pp. 404–405 *infra*. Switzerland and Sweden, the sole neutrals adjacent to belligerents, were the meccas sought by almost every escaped prisoner of war.

[268] Nordic Experts 166. Article 4B(2) of the 1949 Conventions refers to "neutral or non-belligerent Powers." The Fifth Hague Convention of 1907 refers only to "neutral Powers." "Nonbelligerency" is a comparatively recent phenomenom of the law of international armed conflict.

[269] During World War II Switzerland and Sweden both replied negatively to an ICRC request that the 1929 Convention be applied to military internees. Switzerland objected primarily because of the restrictions on the punishment which could be adjudged for attempted escape; and Sweden felt that it would impose unnecessary and complex problems on the neutral Power of refuge. 1 ICRC *Report*, 559; 2A *Final Record* 244.

[270] Article 15 provides that the Detaining Power must provide maintenance and medical care "free of charge." The last paragraph of Article 30 provides that the cost of medical care "shall be borne by the Detaining Power." By eliminating these provisions as far as neutral Powers are concerned, Article 12 of the Fifth Hague Convention of 1907 remains applicable. This Article provides that on the conclusion of peace the expenses incurred by the neutral State "shall be made good." Presumably, this means that the neutral State will be reimbursed by the Power of Origin for all expenses incurred for the maintenance and medical care provided to its military internees.

[271] *See* note 269 *supra*. The other provisions of the Convention relating to penal and disciplinary sanctions (Article 82–108) are applicable to military internees. Baxter, Asylum 494.

[272] Article 126 is one of the provisions relating to visits to prisoner-of-war installations by representatives of the Protecting Power and the ICRC. *See* pp. 281–284 and 309–311 *infra*. In view of the general practice followed during World War

Even though Articles 8 and 10, relating to the designation of Protecting Powers and their substitutes, are thus specifically stated not to be applicable under any circumstances, for some reason the draftsmen of the Convention found it appropriate to be redundant in this respect and to provide additionally in general terms that, where diplomatic relations continue to exist between the neutral Power and the Power of Origin of the interned military personnel (as they undoubtedly will in most cases), the articles of the Convention with reference to the Protecting Power would be included among the excepted provisions;[273] and that, in this event, the Power of Origin is itself authorized to perform the functions of the Protecting Power.[274] This latter procedure appears both logical and adequate, as there certainly can be no question but that the diplomatic representatives of the Power of Origin will be capable of, and motivated toward, supervision of the treatment which their interned fellow nationals are receiving in the territory of the neutral Power. It is regrettable, however, that by including Article 126 among the excepted articles, the ICRC, with its wealth of expertise, has been deprived of the right to visit the military internee camps located in the territory of neutral Powers which maintain diplomatic relations with the Power of Origin.[275]

9. Medical Personnel and Chaplains

The final paragraph (Article 4C) admonishes that the provisions of that Article "shall in no way affect the status of medical personnel and chaplains." A discussion of the significance of this provision appears also to provide an appropriate point for a brief review of the cognate provisions of the First and Second Conventions relevant to the status of the wounded, sick, shipwrecked, members of the medical profession, and chaplains—on land and sea—when they fall into the power of the adverse Party.

Both the First and Second Conventions contain an Article 13 which

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II of permitting ICRC visits to military internee camps in neutral States (1 ICRC *Report* 560–62), it is difficult to understand why Article 126 was included among the exceptions.

[273] 3 *Final Record*, Annexes 91 and 93, at 62; 2A *Final Record* 466.

[274] But Article 126, probably the most important article with respect to the functions of the Protecting Power, has been specifically excepted. *See* note 272 *supra*. Surely, this does not mean that visits to military internee internment installations are to be omitted from the functions of the Protecting Power which are to be performed by the representatives of the Power of Origin.

[275] It should be mentioned that Article 9, the Article which establishes the basic international juridical status of the ICRC under the Convention, is not among the excepted articles and it may be that the ICRC could use this and other provisions to support the argument that, just as it may normally operate in parallel with the Protecting Power, here it may so operate with the Power of Origin.

is identical with Article 4A of the Third Convention.[276] Article 14 of the First Convention (Article 16 of the Second) provides that "the wounded and sick [and shipwrecked] of a belligerent who fall into enemy hands shall be prisoners of war."[277] This means that the Third Convention is applicable in its entirety to any individual who comes within any of the classifications established by Article 4A (or its identical counterparts, Article 13 of the First and Second Conventions), and who, while wounded, sick, or shipwrecked, falls into the hands of the enemy. Actually, it would appear that these articles were included in the First and Second Conventions from an excess of caution inasmuch as, even without them, the individuals concerned would have come within the purview of Article 4A of the Third Convention. If an individual is, for example, a member of the regular armed forces of a belligerent, the fact that he was wounded or sick at the time that he fell into the power of the enemy could scarcely affect his entitlement to prisoner-of-war status. It is therefore obvious that the only problems which will arise in this respect are those which have already been discussed and which will arise whether the individual who falls into the power of the enemy is hale and hearty, wounded or sick, conscious or unconscious. The unique problems which arise in this area arise not with respect to the patients, but with respect to the people whose function it is to care for them.[278] Medical personnel, and the assisting staff, engaged exclusively in the collection, transport, and treatment of the wounded and sick, or in the prevention of disease, are entitled to

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[276] The First Convention is concerned with the wounded and sick of land armies; the Second is concerned with the wounded, sick, and shipwrecked at sea. As the provisions of these two Conventions that are of interest here are largely identical, all references will be solely to the First Convention and its provisions except where specific reference to the Second Convention is deemed appropriate. The First Convention of 1949 is the fourth chronologically (1864, 1906, 1929, and 1949) of the series known as the "Red Cross" Conventions. Prior to 1949 they had been made applicable to naval warfare by "adaptation" treaties (*Third Hague Convention of 1899 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864;* and *Tenth Hague Convention of 1907 for the Adaptation of the Principles of the Geneva Convention* [*of 6 July 1906*] *to Maritime Warfare*).

[277] The Coordination Committee of the 1949 Diplomatic Conference, charged with coordinating the language and substance of the several conventions being drafted, failed to note that at Stockholm the year before the term "fallen into enemy hands" in the Third Convention had been changed to "fallen into the power of the enemy." *See* p. 34 *supra.*

[278] *See generally,* Watson, Status of Medical and Religious Personnel in International Law, 20 *JAG J.* 41. For the most part medical personnel and chaplains are dealt with together in this area of the Conventions. See, *e.g.*, the first two paragraphs of Article 33 of the Third Convention. Accordingly, references in the text hereof to medical personnel should be construed as including chaplains unless the wording used clearly indicates otherwise.

be respected and protected at all times.[279] When they fall into the power of the enemy, they are *not* prisoners of war—but they are entitled, *as a minimum,* to the benefits and protections of the Third Convention;[280] they may be retained by the Detaining Power only to the extent that their services are required for the care of prisoners of war;[281] while their services are so used, the Detaining Power must afford these "retained personnel" the opportunity and the facilities for performing their professional functions;[282] and the Detaining Power has an obligation to release them and to return them to their Power of Origin if their retention is not "indispensable."[283]

The 1929 Wounded-and-Sick Convention provided for the return of medical personnel "as soon as the way is open for their return," absent an agreement to the contrary between the Detaining Power and the Power of Origin.[284] A number of such agreements were reached;[285] and very few retained persons were ever returned to their Power of Origin during the course of hostilities.[286] Realizing that similar problems would be presented by the very provisions that it was including in the new First Convention, the 1949 Diplomatic Conference adopted a resolution which requested the ICRC to draft model agreements implementing Articles 28 and 31 of the First Convention, dealing with the relief and retention of medical personnel and chaplains.[287]

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[279] Article 24, First Convention; Article 37, Second Convention. The latter provides that the retained "religious, medical and hospital personnel" are, upon landing, subject to the provisions of the First Convention.

[280] First paragraph, Article 33, Third Convention; second paragraph, Article 28, First Convention. Pictet, *Commentary on the First Convention* 243.

[281] The prisoners of war for whom their professional services are required should be "preferably those of the armed forces to which they themselves belong." Second paragraph, Article 28, First Convention.

[282] *See* the first two paragraphs of Article 33, Third Convention. The author was told by several officers of the Pakistani Army Medical Corps that after two embryonic escape tunnels (with which they had had no connection) were discovered by the authorities at their prisoner-of-war camp in India in the spring of 1972, the seven retained medical officers were no longer permitted to perform their professional functions on behalf of the prisoners of war. Nevertheless, they were only released by the Indian authorities a year and a half later, in February 1974, as a part of the general repatriation. This was, of course, a blatant violation of Articles 28 and 30 of the First Convention and of Articles 4C and 33 of the Third Convention.

[283] Article 30, First Convention.

[284] Article 12, 1929 Wounded-and-Sick Convention.

[285] 1 ICRC *Report* 202; Rich, Brief History 497–98.

[286] 1 ICRC *Report* 202; 1947 SAIN 5.

[287] Resolution 3, 1 *Final Record,* 361. Article 31 of the First Convention provides for special agreements concerning medical personnel "to be retained"; Article 28 of the First Convention and the third paragraph of Article 33 of the Third Convention both provide for special agreements concerning the relief of retained personnel.

The ICRC did so,[288] but, of course, this merely means that models exist and will be available for possible use when the occasion arrives. Whether, and to what extent, States will make use of them will only become evident in the event. The ICRC itself has said that "[i]t can be foreseen that, in a future conflict, retention will become the rule."[289]

Individuals who, although trained in a medical or dental profession, are not attached to the medical service of the armed force in which they are serving at the time that they fall into the power of the adverse party may, nevertheless, be required by the Detaining Power to perform medical functions on behalf of prisoners of war who depend on the same Power of Origin that they do. While they are so engaged, they are entitled to the same treatment as retained personnel, and they cannot be required to do any other work. However, they continue to be prisoners of war.[290]

In most armies there are a number of functions that are performed by individuals who are not normally involved in combat. These individuals frequently have a secondary duty to act as stretcher-bearers and emergency medical personnel in time of need.[291] If they fall into the power of the enemy while they are engaged in their primary functions, they are, of course, ordinary prisoners of war. However, if they fall into the power of the enemy while actually engaged in medical functions, although they are prisoners of war, their employment in a prisoner-of-war camp is to be on medical duties "in so far as the need arises."[292] There is no indication as to the method by which a prisoner of war will be able to establish the exact function that he was performing at the time when he fell into the power of the enemy.

One problem in the medical personnel area which was not covered in the 1929 Wounded-and-Sick Convention, and which is only tangentially covered in the 1949 Conventions, concerns the disciplinary powers of the Detaining Power when medical personnel act improperly. During World War II the Germans issued an order providing that attempted escapes by medical personnel could be punished by "a temporary or permanent suspension of their privileges, in full or in part."[293] There was probably no legal basis for the issuance of this order, but certainly the Detaining Power has to have some power of discipline.

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[288] ICRC, *Model Agreement*.

[289] *Ibid.* at 8 (Trans. mine).

[290] Article 32, Third Convention.

[291] For example, bandsmen, mess personnel, clerks, etc. For a problem of identification encountered during World War II, see Rich, *Brief History* 517.

[292] Articles 25 and 29, First Convention.

[293] *German Regulations*, No. 6, para. 5. One writer has raised the issue of the effect on medical personnel of the United States armed forces of the provisions of the so-called *Code of Conduct*, Sec. III of which makes it the duty of *any* member of the United States armed forces who has been captured to "make every effort to escape." Smith, Code of Conduct 98–99.

Article 33(c) of the Third Convention now provides that these individuals are "subject to the internal discipline of the camp in which they are retained."[294] It would therefore appear that they could now legally be disciplined for attempted escape to the same extent as a prisoner of war.[295] But what of the physician in the power of the enemy who, perhaps for some ideological reason, refuses to perform any professional duties and will not provide medical treatment for the sick and wounded members of the armed forces of his own Power of Origin? This was the procedure followed by most of the North Vietnamese medical personnel captured in Vietnam.[296] The South Vietnamese responded by treating them as ordinary prisoners of war.[297] Once again, there was probably no specific legal basis for such action; but certainly, if a member of the medical profession refuses to employ his professional abilities, even for the benefit of his own countrymen, he is denying his professional status and, under those circumstances, there is little that a Detaining Power can do except to remove him from the category of a retained person and to place him in a general prisoner-of-war status (unless his recalcitrance is to be rewarded by repatriation).

10. Problems of General Import

There are a number of categories of individuals concerning whom special problems arise when they fall into the hands of a belligerent Power; and while in some such categories the numbers of individuals involved have been comparatively small, nevertheless the problems which they create are considered worthy of mention.

a. NATIONALITY

Normally, the nationality of the individual falling within one of the categories enumerated in Article 4 is that of the belligerent Power for

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[294] The Article goes on to prohibit the Detaining Power from compelling them to do any work other than medical or religious. The provision quoted in the text refers only to disciplinary matters (Articles 89–98, Third Convention. *See* pp. 324–330 *infra*. Presumably, there is no question of the right of the Detaining Power to impose penal sanctions for crimes (Articles 99–108, Third Convention). *See* pp. 330–342 *infra*.

[295] *See* Articles 91–94, Third Convention, and the discussion thereof at pp. 403–407 *infra*.

[296] Actually, those doctors who refused to function in their professional capacities probably did so because of specific orders received before capture, orders based upon the desire to place a greater burden on the medical facilities of the armed forces in South Vietnam.

[297] *Vietnam, Article-by-Article Review*, Article 32. In Korea many of the captured North Korean medical personnel had participated in the prisoner-of-war camp mutiny conspiracy. U.N.C., Communist War, part II, sec. B, para. 10, at 16. No action was taken against them.

which he is fighting.[298] However, he may have the nationality of a neutral, or of an ally of the belligerent in whose armed forces he is serving at the time that he falls into the power of the enemy—or even of the adverse Party, or one of its allies. Does this affect his entitlement to prisoner-of-war status? Apparently there is no dispute with respect to the entitlement to prisoner-of-war status of an individual who is a national of a neutral State or of a State which is an ally of the belligerent in whose armed forces he is serving.[299] However, the entitlement to such status of an individual who is a national of the Capturing Power, or of one of its allies,[300] is the subject of dispute.

Several writers, notably Lauterpacht, have taken the position that the national of the Capturing Power who falls into its power while serving in the armed forces of the enemy is not entitled to prisoner-of-war status or to the protection of international law.[301] This position has been cited and approved by the Privy Council[302] in a decision which has been the subject of criticism.[303] Certainly, the individual concerned could be tried for treason under the municipal law of the Capturing Power whose nationality he carries; but this does not mean that he is not entitled to the protection of prisoner-of-war status at

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[298] This is undoubtedly the basis for the invention of the term "Power of Origin" to indicate the Power upon which the prisoner of war depends, although it may, in a particular case, be a complete misnomer.

[299] Flory, *Prisoners of War* 33–35; Lauterpacht–Oppenheim 261; Greenspan, International Law 32; Elman, Prisoners of War 180. In *German Regulations*, No. 32, para. 513, the German order said:

> 513. *U.S. prisoners of war in British uniforms.* Prisoners of war of U.S. nationality captured as members of Canadian armed forces are considered British prisoners of war regardless of whether they joined the Canadian services before or after the entry of the United States into the war.

The German orders on this subject systematically followed the principle that the nationality of the individual for prisoner-of-war purposes was decided by the uniform which he was wearing at the time of his capture. *Ibid.*, No. 1, para. 1; No. 13, para. 56; No. 32, para. 513; No. 33, para. 561. This was also the position of the United States. *See* 12 Dept. State Bull. 864 (1945).

[300] No specific discussion has been found of the problem involved when the captured individual is a national of an ally of the Capturing Power. However, this would probably make no difference as the Capturing Power could transfer the individual to its ally under Article 12 of the Convention and the individual would then be in the custody of his own nation as Detaining Power.

[301] Lauterpacht–Oppenheim 268. *See also* Flory, *Prisoners of War* 29–30. The latter emphasizes that the contrary is true if the individual has been naturalized by the belligerent State in whose armed forces he was serving at the time of capture. Dual citizenship in the two opposing belligerents would also present a problem under Lauterpacht's thesis.

[302] *Public Prosecutor v. Koi.*

[303] Baxter, Qualifications 291–94; Elman, *Prisoners of War* 180–95.

least up to and during the trial.[304]

The problem has been adverted to by the courts of the United States on two separate occasions. Writing in 1942, the United States Supreme Court said:

> . . . Citizens [of the United States] who associate themselves with the military arm of the enemy government . . . are enemy belligerents within the meaning of the [Fourth] Hague Convention [of 1907] and the law of war.[305]

And in 1946, in a case involving an Italian prisoner of war who had sought habeas corpus on the ground that he was an American citizen and that he could not, therefore, be held as a prisoner of war by the United States, the United States Court of Appeals said:

> We have reviewed the authorities with care and we have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle.[306]

It is believed that the principle to be extracted from these two opinions expresses the proper rule of international law, and that any individual who falls into the power of a belligerent while serving in the enemy armed forces should be entitled to prisoner-of-war status no matter what his nationality may be, if he would be so entitled apart from any question of nationality; subject to the right of the Detaining Power to charge him with treason, or a similar type of offense, under its municipal law and to try him in accordance with the guarantees contained in the relevant provisions of the Convention.[307]

b. DESERTERS AND DEFECTORS

There has been much confusion in the use of these and related terms.[308] In the discussion which follows, the word *deserter* is used to

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[304] Lauterpacht said: "The privileges of members of armed forces cannot be claimed by. . .traitorous subjects of a belligerent who, without having been members of his armed forces, fight in the armed forces of the enemy. . . ." Lauterpacht–Oppenheim 268. If he refers solely to the right of the Detaining Power to try them for treason under its municipal law, he is correct. However, if he would deny them the protection of the Convention from the very outset of captivity, then it is believed that the quoted statement no longer represents the international law rule, the Privy Council in *Public Prosecutor v. Koi* to the contrary notwithstanding. Elman, Prisoners of War 180 & 184. *See also* Wilhelm, *Status* 32–34, 35 *R.I.C.R.* at 686–87.

[305] *Ex parte Quirin*, 317 U.S. at 37–38.

[306] *In re Territo*, 156 F.2d at 145. This case was found to be unpersuasive by the Privy Council in *Public Prosecutor v. Koi.*

[307] *See* pp. 330–342 *infra.*

[308] Thus, when García-Mora writes at length concerning *deserters*, it is patent that the individuals to whom he is referring are actually those who will be here referred to as *defectors*. García-Mora, *Asylum* 103–07. The same confusion is found in Clause, Status 34–35. Although it is believed that he errs in other re-

connote one who absents himself from his place of duty without the permission of his proper authorities. In the context of this study he thereafter comes into the custody of the enemy armed forces, perhaps by voluntary surrender, seeking the dubious refuge of a prisoner-of-war camp primarily as a means of escaping from the fears and dangers of the battlefield.[309] His change in status is motivated by a lack of amenability to military life in general, and to combat in particular, and *not* by ideology. The word *defector*, on the other hand, is used to connote one who deliberately seeks refuge with the enemy because he disagrees with the policies and politics of his own Government and agrees with those of the enemy.[310] He *is* motivated by ideological considerations, and when he leaves his place of duty he probably desires and intends, if possible, to join the enemy armed forces in order to help hasten the attainment of his ultimate objective: the victory of the enemy and the defeat of his own country. Obviously, both these categories involve some identical and some different problems.

The *deserter*, like any other member of the regular armed forces of his country who falls into the power of the enemy, becomes a prisoner of war.[311] The fact that he deserted and, perhaps, on his own initiative, sought an opportunity to surrender does not change his position under international law and, insofar as the Capturing Power is concerned, whatever may be his legal status under the civil and military law of his own country. One man, wounded, surrenders because he is physically unable to continue to fight; another man, a deserter, surrenders because he has lost the will to fight. The reason for the surrender is immaterial. Both of these men, as members of the regular armed forces of their country, come within the provisions of Article 4A(1) of the

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spects, Hess draws the proper and necessary distinction between deserters and defectors. Hess, Post-Korea 55. So, too, do Esgain & Solf 555.

[309] The deserter does not necessarily come under the power of the enemy. He may seek refuge in a neutral country; or, if he is located in his own national territory, or in territory contiguous to his own national territory, he may return home or seek to lose himself among the civilian population.

[310] For this reason, one author writing shortly after World War I speaks of defectors as "refugees." Fooks, *Prisoners of War* 83. A SEATO directive defines a defector as follows:

> A defector. . .is any person who is voluntarily or involuntarily serving the enemy, either as a member of its Armed Forces or otherwise, who voluntarily terminates his service to the enemy for the purpose of bearing arms on behalf of SEATO, or to otherwise assist the SEATO cause, and who immediately upon capture or submission to SEATO control, gives express notice that he no longer desires to serve the interests of the enemy state.

SEASTAG No. 2033, Interrogation of Captured or Otherwise Detained Personnel (CDP), Annex C, para. 4 (1970).

[311] Flory, *Prisoners of War* 30.

Convention and are entitled to prisoner-of-war status.[312]

It has been suggested that the deserter is not entitled to prisoner-of-war status on the basis of either of two arguments: (1) that the failure to mention deserters specifically in the enumeration contained in Article 4 was a deliberate omission;[313] and (2) that deserters do not "fall" into the power of the enemy.[314] The first argument is unconvincing because the member of the armed forces who deserts and surrenders to the enemy is, nevcrthless, a member of the armed forces within Article 4A(1) of the Convention; hence, it was no more necessary to include deserters as specifically being within that category than it was to include cooks, artillerymen, or noncommissioned officers, all of whom are equally members of the armed forces. And the second argument is also unconvincing because, as we have seen,[315] the words "fallen into the power of the enemy" were substituted for the word "captured," previously used, precisely in order to ensure prisoner-of-war status to those who surrender voluntarily.

One other problem remains with respect to deserters who surrender to the enemy—their disposition upon the cessation of active hostilities. Historically, for obvious reasons, they were not repatriated upon the termination of hositilities. However, this policy changed during the nineteenth century.[316] Under the 1949 Convention the Detaining Power would be required to repatriate *all* prisoners of war, including deserters, upon the cessation of active hostilities. However, if the policy of "voluntary repatriation," and "no forcible repatriation," can be considered as a proper interpretation of Article 118, and as indicative of the manner in which belligerents will interpret and apply Article 118 as a matter of practice—and it is believed that it is[317]—the deserter could, and presumably in most cases would, elect to decline to be repatriated.

A *defector* has been defined above as one who seeks refuge with the enemy because, in effect, ideologically he supports its objectives and opposes those of his own country. As a member of the armed forces

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[312] So-called surrender leaflets—leaflets released behind enemy lines by artillery shells or by air drops encouraging surrender—usually promise good food and good treatment as prisoners of war in a comfortable prisoner-of-war camp far removed from the perils of war, promises which are not always kept. Shub, *The Choice* 63–64.

[313] Clause, Status 16; García-Mora, *Asylum* 103–04.

[314] Wilhelm, Status 29, 35 *R.I.C.R.* at 682.

[315] *See* pp. 34–36 *supra*.

[316] Garcia-Mora, *Asylum* 104. He further states that the practice of incorporating amnesty clauses in peace treaties gave the necessary protection to repatriated deserters. *Ibid.* This may have been true at one time but it certainly is not so at present.

[317] *See* the discussion of voluntary versus involuntary repatriation at pp. 421–426. *infra*. *See generally*, Schapiro, Repatriation 310–11; García-Mora, *Asylum* 103–06; Clause, *Status*, *passim*.

of his country he, too, has a right to prisoner-of-war status; and under Article 7 of the Convention this is a right which he cannot renounce.[318] However, there have been numerous occasions upon which defectors have affirmatively sought, or have been encouraged, to serve in the armed forces of the Detaining Power.[319] To permit them to do so is a violation of Articles 4, 5, and 7 of the Convention.[320] This does not mean that defectors may not *voluntarily* assist the Detaining Power while remaining prisoners of war. They may, for example, without bringing the Detaining Power into conflict with the provisions of the Convention, act as interpreters, draft surrender leaflets,[321] write radio propaganda scripts, give indoctrination lectures, and even act as undercover informers on their fellow prisoners of war.[322] Defectors were permitted to give up their prisoner-of-war status and to join the armed forces of the Detaining Power during World War I[323] and World War II.[324] This was one of the major reasons for the inclusion in the Con-

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[318] *See* pp. 91–93 *infra.*

[319] Article 130 makes it a grave breach of the Convention to *compel* a prisoner of war "to serve in the forces of the hostile power." *See* pp. 361–363 *infra.*

[320] Under Article 4A(1) they are, upon falling into the power of the other side, prisoners of war. Under Article 5 this status continues from the time of falling into the power of the other side until "final release and repatriation." And under Article 7 prisoners of war may not renounce in part or in their entirety the rights secured to them by the Convention.

[321] During the armed conflict in Korea (1950–53) a question arose within the United Nations Command (U.N.C.) concerning the legality of the use of Chinese prisoners of war who had volunteered to draft surrender leaflets to be disseminated among the members of the "Chinese People's Volunteers." The decision reached was that they could be given this task but that it would be necessary to notify the ICRC (the de facto Protecting Power for prisoners of war captured by the U.N.C.) of their location as a work detachment so that the ICRC could continue to assure that only true volunteers were being so used.

[322] The North Koreans and the Chinese both made extensive use of this latter technique during the armed conflict in Korea. U.S. *POW* 27; U.K. *Treatment* 20; Schein, Patterns 257; Anon., Misconduct 727–28. It is, of course, extremely demoralizing to the great body of prisoners of war who are and remain loyal to their own country, so it serves a dual purpose for the Detaining Power. It was a major reason for the promulgation by the President of the United States of the *Code of Conduct for Members of the Armed Forces of the United States*, Sec. IV of which is a direct attempt to reduce participation in this type of activity by members of the armed forces of the United States who become prisoners of war. Prugh, Code of Conduct 687–88.

[323] For example, the German-created "Irish Brigade" composed of captured Irish members of the British armed forces. U.S., *POW* 55–56. *See* p. 361 *infra.*

[324] The Soviet Union created units of captured Germans, the Germans created units of captured Russians, etc., etc. *See* Harrison, *Cross-Channel Attack* 145. Concerning the recruitment of Indian prisoners of war by the Germans and by the Japanese during World War II, *see* Calvocoressi & Wint 804–05 & 806–09. (It should be noted, however, that in both World Wars the majority of the individuals who served in the enemy's armed forces after having been captured were not ori-

vention of the provisions of Article 130, prohibiting involuntary, and Article 7, effectively prohibiting voluntary, service by a prisoner of war in the armed forces of the Detaining Power.[325]

The defector, then, like the deserter, is a prisoner of war and the 1949 Convention, with all its prohibitions and safeguards, is fully applicable to him.[326] Obviously, the question of whether he is to be repatriated upon the cessation of active hostilities is even more important to him than it is to the deserter, particularly if he has been permitted to serve in the armed forces of the Detaining Power. Once again, it would appear that this question presents no problem if legal and humanitarian considerations require that Article 118 be so interpreted as to permit each prisoner of war to make his own personal determination as to whether he desires to be repatriated, particularly when it is obvious that his repatriation inevitably means either a very long term in prison or even a death sentence.[327]

It must be emphasized that the foregoing discussion of deserters and defectors is strictly from the point of view of international law in

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ginally defectors but were ordinary prisoners of war who were induced by promises, or by more forcible methods of persuasion, to join the Detaining Power's armed forces.) *See also* note VI-79 *infra*.

[325] During the armed conflict in Korea the North Koreans justified the disappearance of literally tens of thousands of admittedly captured members of the Republic of Korea Army by insisting that after "reeducation" they had all elected to join the armed forces of North Korea. *See* note VI-81 *infra*. In Vietnam both sides "reeducated" their captives and then inducted them into their respective armed forces. The "Chieu Hoi" ("open arms" or "welcome return") program of the Republic of Vietnam was, to a considerable extent, a violation of the Convention. For a discussion of this latter program and the results which it is claimed to have attained, see Brewer, Chieu Hoi, *passim*. One author argues that as the Republic of Vietnam was dealing with its own citizens, and not foreign nationals, "the Chieu Hoi program may be defended as an act of amnesty or pardon." Bond, Proposed Revisions 238. There are merits to this contention, particularly as the Republic of Vietnam itself decided that permitting members of the armed forces of the People's Republic of Vietnam (North Vietnam) to join the Chieu Hoi program violated Article 7 of the Convention. *Vietnam, Article-by-Article Review*, Article 7.

[326] For a contrary view, see Hess, Post-Korea 52. However, that author does seem to indicate that this is a matter which is subject to individual national political decisions, decisions which can be based upon the arguments discussed above (see text in connection with notes 314 and 315 *supra*) with respect to the interpretation of the term "fallen into the power of the enemy." *Ibid.*, 58. *See also* U.N., *Human Rights*, A/7720, para. 88; *British Manual* para. 126. (The latter draws a distinction between defectors, who are stated not "to be entitled to be treated as prisoners of war" and prisoners of war who defect during captivity who "retain their status and cannot be deprived of it." *Ibid.*, n.1. This position would, of course, preclude "Irish Brigades" (*see* note 323 *supra*) in future armed conflicts.

[327] *See* the discussion of Article 118 at pp. 417–429 *infra*. With respect to the humanitarian considerations, see García-Mora, *Asylum* 106–07.

general and the 1949 Convention in particular, and does not purport to concern itself with municipal law questions. Certainly, if the deserter is, by any means, returned to the custody of his national armed forces he may be tried for desertion,[328] or for any other appropriate violation of municipal law. Under similar circumstances, the defector may likewise be tried for desertion,[329] treason, or any other appropriate violation of municipal law. And, of particular relevance, it appears to be generally accepted that the defector who subsequently falls into the power of his own national armed forces—the armed forces from which he defected—while serving in the armed forces of the enemy, is *not* entitled to prisoner-of war status.[330]

c. COMMANDOS

It has long been a generally accepted rule of the law of war that members of the armed forces of a belligerent, captured in uniform while engaged in missions behind the enemy lines, are entitled to prisoner-of-war status.[331] During World War II Hitler became incensed as a result of the successful operations of the Allied commandos. He thereupon issued the so-called Commando Order,[332] under which all commandos were "to be exterminated to the last man, either in combat or in pursuit" and no quarter was to be given to them. After the war a number of German officers were tried and convicted of war crimes arising out of their implementation of what was almost universally regarded as an obviously illegal order.[333] Post–World War II service manuals emphatically reiterated the old rule.[334] And Article 37 of the 1972 Draft Additional Protocol was even more specific in attempting to assure prisoner-of-war status for uniformed members of the armed forces captured while behind the enemy lines.[335]

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[328] Clause, *Status* 33.

[329] *Ibid.*

[330] Flory, *Prisoners of War* 142; Lauterpacht–Oppenheim 268; *British Manual* para. 103; Draper, *Recueil* 110.

[331] Second paragraph of Article 29, 1899 *Hague Regulations* and 1907 *Hague Regulations.*

[332] This is the *Führerbefehl* of 18 October 1942, reproduced at 1 *L.R.T.W.C.* 33–34 and at 11 *L.R.T.W.C.* 20–21. *See* note 146 *supra.*

[333] *See, e.g.*, the *Dostler Case* and the *Falkenhorst Case. See also*, Kalshoven, *Reprisals* 184–93. The various aspects of the order were directly violative of Articles 23(c) and (d) of the 1907 *Hague Regulations.*

[334] *U.S. Manual* para. 63; *British Manual* para. 105; *Swiss Manual*, paras. 41–42.

[335] 1972 *Basic Texts* 14. The article was somewhat ineptly drafted in that it merely referred to the need to comply "with the conditions laid down in Article 4 of the Third Convention." 1973 *Commentary* 46. Article 46(2) of the 1977 Protocol I provides specifically that a member of the armed forces who gathers information in enemy territory does not engage in espionage "if, while so acting, he is in the uniform of his armed forces." In *Military Prosecutor v. Kassem* (42 *I.L.R.* at 483) the opinion indicates that being in possession of civilian clothes at the time of capture, even if they were not being worn, might be a basis for a denial of prisoner-

One matter collateral to the problem of commandos, that of airmen, should be mentioned, if for no other reason than because they are frequently referred to in tandem with commandos in service manuals.[336] There appears to be no dispute that parachute troops are active combatants during the course of their jump and may be fired upon while in the air and subsequently on the ground until they are actually captured by the enemy and become prisoners of war. However, the treatment of airmen in distress, the members of crews who have bailed out of their aircraft after it has been rendered nonairworthy, has occasioned some problems. During World War II the Nazis adopted an official policy of failing to protect these individuals from the wrath of the much-bombed civilian population even after they were in official custody and were, therefore, entitled to be protected as prisoners of war.[337] And the Egyptians have taken the rather novel position, which has no precedent in practice and no legal justification in either customary or conventional international law, that the distressed airman is entitled to protection en route to the earth (and to prisoner-of-war status thereafter) if he will land in territory controlled by the enemy, but not if he will land in territory controlled by forces friendly to him.[338]

d. SPIES AND SABOTEURS

Little discussion of these two categories is required here. As we have seen,[339] even individuals who fall within the categories specifically enumerated in Article 4 are not entitled to prisoner-of-war status if, at the time of capture by the enemy, they were dressed in civilian

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of-war status. As the defendants in that case were found not to be entitled to the protection of the Convention for other reasons, the statement in the opinion may be regarded as debatable dictum.

[336] *See, e.g., U.S. Manual* para. 63.

[337] IMT 472. After the war ended a number of members of the German armed forces were convicted of the war crime of failing to protect prisoners of war from physical attacks by civilians. *See, e.g.*, the *Essen Lynching Case* and the *Trial of Bury*.

[338] The argument advanced by Egypt was that a pilot was more valuable than the plane he flew and that a pilot shot down over friendly territory could be flying another plane in combat a few hours later. (Under this thesis the Germans could have machine-gunned British fighter pilots parachuting from their destroyed planes during the Battle of Britain.) The ICRC apparently supported the position of "modern military manuals" which prohibited attacks on air crews in distress even when they would land in friendly territory. 1973 *Commentary* 45. As adopted in committee during the 1976 session of the Diplomatic Conference, Article 39(1) included the Egyptian proposal ("unless it is apparent that he will land in territory controlled by the party to which he belongs or by an ally of that party"). However, at the 1977 session of Committee III that phrase was eliminated in its entirety from what became Article 42(1) of the 1977 Protocol I.

[339] *See* pp. 36–37 *supra*. *See also Ex parte Quirin* 367 U.S. at 31; Draper, *Recueil* 109–10.

clothes and were engaged in an espionage or sabotage mission behind enemy lines. It necessarily follows that all other individuals—those who do not fall within the enumeration contained in Article 4 of the Convention—are likewise denied prisoner-of-war status when they are captured while engaged in such a mission.[340]

e. OTHERS

Historically, a number of other categories of persons were subject to capture and to prisoner-of-war status, persons such as the Chief of State, whether sovereign or president, members of his family, and his chief ministers.[341] This is no longer true.[342] If such individuals fall into the power of the enemy when the latter overruns their national territory, they will come within the protection of the Fourth (Civilians) Convention, and they may only be placed in assigned residence or interned. If they are taken into custody by the enemy as a result, for example, of a commando raid into territory controlled by their own national armed forces, or of the capture of a vessel on the high seas, they would not come within the ambit of the Third Convention, but, once again, they would benefit from the appropriate provisions of the Fourth Convention.

In the past, military attachés or other diplomatic representatives of neutral nations have sometimes been permitted by the country to which they are accredited, or to which they are sent for the specific purpose, to accompany its armed forces in the field as observers. When taken into custody by the armed forces of the adverse Party, they are not prisoners of war but they may be ordered out of, or removed from, the theater of war by the Party into whose hands they have fallen.[343] This assumes that they have taken no part in the hostilities.[344] If they have acted as "military advisers," thus actually rendering military assistance to the armed forces opposing those of the belligerent Power into whose hands they have fallen, it could be argued that they fall

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[340] Article 29, first paragraph, 1907 *Hague Regulations; U.S. Manual* para. 76; *British Manual* para. 326; *Swiss Manual* para. 38. *See generally,* Article 46 of the 1977 Protocol I.

[341] Davis, Prisoner of War 531; Risley, *The Law of War* 129.

[342] It remains true for the Chief of State if he is, by statute or constitution, the commander in chief of the armed forces; and for a minister if he is, in addition to his political office, a member of the regular armed forces or is accompanying the armed forces in the field in one of the categories included in Article 4A. *British Manual* para. 127.

[343] *British Manual* para. 129; *U.S. Manual* (1940 ed.) para. 77; *U.S. Manual* para. 83. A note in the *British Manual* states that during the Russo-Japanese War (1904–05) a British naval attaché and two American military attachés accompanying the Russian forces were captured by the Japanese at Mukden. They were sent to Tokyo and turned over to their respective Ministers. Concerning this episode see Ariga, *Guerre russo-japonaise* 122.

[344] This is stated as one of the requirements in each of the sections of the manuals cited in the previous note.

within the ambit of Article 4A(4)[345] and that they are therefore entitled to prisoner-of-war status.[346]

11. Conclusions

The above discussion involving the determination of entitlement to prisoner-of-war status under the 1949 Convention should not be considered exhaustive either as to the categories of persons entitled to that status,[347] or as to the problems which may conceivably arise in this area of the law of armed conflict,[348] particularly as the characteristics of armed conflict, and of the combatants participating therein, are in an extraordinary period of change. Despite the minimal attention paid to the subject of prisoners of war in general and entitlement to prisoner-of-war status in particular in the 1973 Draft Additional Protocol, the decisions in this area made by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts and included in the 1977 Protocol I demonstrate that the subject continues to be in a state of flux and is one in which major changes may be anticipated, changes which may come about by negotiation, but which will more probably evolve out of the practice of nations.

F. SOME GENERAL PROBLEMS

1. Agreements between Belligerents

While it is far from easy to obtain agreements between opposing belligerents during the course of international armed conflict, particularly with respect to matters involving the conduct of that conflict,

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[345] The enumeration contained in that article is merely illustrative as is indicated by the fact that it starts with the words "such as."

[346] The practice followed by the Vietcong and the North Vietnamese does not furnish a particularly strong precedent with respect to the status of "military advisers" inasmuch as neither of them gave prisoner-of-war status to any captured Americans, whether serving as military advisers to the Republic of Vietnam armed forces or, subsequently, as members of combat units. However, inasmuch as all such individuals were treated (or maltreated) equally, it may be argued that it does furnish a precedent of sorts supporting the premise contained in the text. The problem of the status of military advisers, either before or after capture, has received suprisingly little attention from commentators.

[347] *See* note 345 *supra*. *U.S. Manual* para. 70; *British Manual* para. 127 n.1. Moreover, as the two manual provisions point out, there is nothing to preclude a Detaining Power from granting prisoner-of-war status or treatment to individuals, or categories of individuals, who cannot conceivably fall within the provisions of Article 4. For an example of this, *see* note 206 *supra*. One category of individuals specifically removed from eligibility for prisoner-of-war status by Article 47 of the 1977 Protocol I is that of "mercenaries."

[348] For example, as one author points out, in the Republic of Vietnam the status of "civil defendant" was to be preferred over that of prisoner of war, despite the fact that the latter had originally been intended to be the most desirable status for an individual in the custody of the enemy, Haight, Shadow War 46.

it *is* possible, and numerous agreements between such belligerents have been reached in past conflicts.[349] Many articles of the Convention contain specific references to agreements between the belligerents;[350] and there are matters covered in other articles that could also conceivably be the subject of such agreements.[351] In fact, the first paragraph of Article 6, which is concerned with special agreements between the belligerents, specifies that the belligerents are not restricted to the subjects enumerated in that Article,[352] that they may conclude agreements on any subjects that they deem appropriate.[353]

There are two major limitations contained in the Convention with respect to the making of special agreements. First, the lead paragraph of Article 6 prohibits any such agreements that "adversely affect the situation of prisoners of war"; and, perhaps of even more importance, it prohibits any such agreements that "restrict the rights which it [the Convention] confers upon them." Hence, special agreements between belligerents may improve the lot of the prisoner of war, but may not in any manner remove or limit any of the rights, privileges, or safeguards assured to them by the Convention.[354] And second, the fifth paragraph of Article 10 prohibits any special agreement derogating from the preceding provisions of that Article (which are concerned with the selection of a substitute for a Protecting Power) when the freedom of one Power is restricted "by reason of military events, more

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[349] *See, e.g.*, the agreements listed in note 39 *supra*. We are, of course, here concerned exclusively with agreements concerning prisoners of war reached by the Detaining Power and the Power of Origin.

[350] The first paragraph of Article 6 lists 17 articles of the Convention that contain some type of provision for agreements between belligerents.

[351] For example, agreements concerning prisoner-of-war food, amplifying the first paragraph of Article 26 even though it contains no mention of the possibility of such agreements, are not inconceivable. *See* p. 126 *infra*. Again, it would frequently be helpful for the belligerents to enter into an agreement concerning comparable ranks, even though the first paragraph of Article 43 is not among those referring to the possibility of agreements between belligerents. *See* p. 168 *infra*.

[352] During World War II the United States and Germany reached an agreement that called for a head-for-head exchange of prisoners of war who had been sentenced to death for the murder of fellow prisoners of war (Lewis & Mewha 76–77), certainly a subject not referred to in the Convention.

[353] It might be asked why sovereign States, as the belligerents in international armed conflict would presumably be, must be granted permission to enter into agreements during the course of hostilities. One answer advanced, and with considerable merit, is that the Convention creates multilateral obligations running between all of the Parties thereto, and the first paragraph of Article 6 permits bilateral amplifications to which agreement of all of the Parties to the Convention would otherwise be required. *See* Wilhelm, Le caractère 579–81.

[354] In Pictet, *Commentary on the First Convention* 75, this provision of the first paragraph of Article 6 is termed "a landmark in the process of renunciation by States of their sovereign rights in favour of the individual and of a superior juridical order."

particularly where the whole, or a substantial part, of the territory of said Power is occupied." This provision arose out of the experiences of World War II when the Scapini Mission replaced the Protecting Power in the supervision of the treatment of French prisoners of war held by the Germans.[355] It is unfortunate, however, that the decision was made to limit this particular prohibition to the provisions of Article 10, concerned solely with substitutes for a Protecting Power, as the same problem can arise in many other areas.[356]

The second paragraph of Article 6 provides that when the belligerents reach a special agreement for the benefit of prisoners of war, the latter shall have the benefits of the provisions of that agreement until (1) it expires by its own terms; or (2) it is superseded by a subsequent and, presumably, more favorable agreement; or (3) the Detaining Power has taken measures more favorable than those contained in the agreement.[357] This provision parallels the first paragraph of Article 5 of the Convention, which provides that the Convention itself protects prisoners of war from the time that they fall into the power of the enemy until their final release and repatriation. Special agreements, once negotiated, have the same duration with the three exceptions noted.

2. Disputes between Belligerents

Inevitably, disputes arise between the opposing belligerents during the course of practically all international armed conflicts, with charges and countercharges passing back and forth, some of which will be fully justified;[358] some of which will be unwarranted, but will have been made in good faith on the basis of apparently reliable information received and believed to be true;[359] and some of which will be made when known to be completely without foundation, and, perhaps, on the basis of evidence known to be manufactured.[360] Not infrequently, such

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[355] *See* notes 52 *supra*, and IV-70 *infra*. *See also*, Pictet, *Recueil* 87–88; Bastid, *Droit des gens* 335; Wilhelm, Le caractère 576. Substantially the same problem arose with respect to the T'Serclaes Mission in occupied Belgium. *See* note IV-70 *infra*.

[356] *See, e.g.*, 1 ICRC *Report;* and Pictet, *Commentary on the First Convention* 71.

[357] Article 41 requires the Detaining Power to post in every prisoner-of-war camp a copy of the Convention and "the contents of any special agreements" in the language of the prisoners of war therein incarcerated. *See* p. 166 *infra*.

[358] *See* note VI-115 *infra*.

[359] *See* note VI-116 *infra*.

[360] The charge made by the Soviet Union, the People's Republic of China and North Korea (not all of whom were admitted belligerents) in 1952 that the United States was using bacteriological weapons in Korea (see note 372 *infra*) is typical of this last category. A demand by the United States for an impartial investigation was, of course, unanswered. The Soviet Union has, by subsequent actions, implicitly admitted the lack of validity of that charge. Levie, *Working Paper* 17. Similarly, the Nazi charge that the British had sunk the *Athenia* in

disputes will involve the treatment, or alleged maltreatment, of prisoners of war. The Convention provides two methods of resolving such disputes.

Article 11 provides that, in the interests of the prisoners of war, Protecting Powers "shall lend their good offices" with a view to settling disputes between belligerents, particularly those involving "the application or interpretation of the provisions of the present Convention."[361] The second paragraph of Article 11 supplements this by providing that, in such a case, the Protecting Power may, at the request of a belligerent *or on its own initiative,*[362] propose to the opposing belligerents a meeting of their representatives, particularly those responsible for prisoners of war, the meeting to take place "possibly on neutral territory suitably chosen."[363] It continues with the provision that the belligerents to whom a proposal for a meeting of their representatives is made "shall be bound to give effect to the proposals made to them for this purpose";[364] and it concludes with an authorization for the Protecting Powers, if they deem it necessary, to propose an individual from a neutral nation, or selected by the ICRC, "who shall be invited to take part in such a meeting." Presumably, such individual would act as a catalyst, a combined conciliator-mediator, whose presence and activities would make it possible for the representatives of the opposing belligerents to negotiate and to reach agreements, despite the handicaps that confront any representatives of opposing belligerents

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September 1939 to create a German atrocity story was made originally on the basis of a complete lack of information, and was later adhered to despite official German reports establishing that a German submarine had been responsible. Von der Porten, *The German Navy in World War II* 36.

[361] Article 87 of the 1929 Convention referred only to "the application of the provisions of the present Convention." The addition of the words "or interpretation" was unsuccessfully opposed by the Soviet Union. 2B *Final Record* 353–54.

[362] The cognate provision of the last paragraph of Article 87 of the 1929 Convention said that the Protecting Powers "may, for instance, propose to the belligerents." In Pictet, *Commentary* 125, the position is taken that, unlike the last paragraph of Article 11 of the 1949 Convention, this provision of the 1929 Convention implied that Protecting Powers could not act on their own initiative, "the initiative being taken by the Party to the conflict whose interests they represent." No basis can be found for this interpretation of the language of the 1929 Convention. However, the last paragraph of Article 11 of the 1949 Convention clearly leaves no room for dispute in this regard.

[363] Neither from the identical wording of the last paragraph of Article 87 of the 1929 Convention, nor from the *travaux preparatoires* of the 1949 Diplomatic Conference, can any clue be obtained as to the interpretation to be given to the words "suitably chosen." Draper, *Recueil* 145.

[364] Despite Colonel Draper's contention (*ibid.*) that by this provision the 1949 Diplomatic Conference was "establishing a duty where none previously existed," the second paragraph of Article 87 of the 1929 Convention actually provided: "The belligerents shall be required to give effect to proposals made to them with this object."

attempting to perform these functions during the actual course of hostilities.

During World War I a great many such meetings took place on neutral territory, and a great many bilateral and multilateral agreements were reached by the opposing belligerents.[365] During World War II not one such meeting took place,[366] primarily because Switzerland, which was the Protecting Power of the great majority of belligerents, did not propose any meetings—probably because it evaluated the probability of successful negotiations at such a meeting as being exceedingly low.[367] Apparently, the participants at the 1949 Diplomatic Conference were not optimistic for the future because, while they attempted to clarify and strengthen the provisions of Article 11, they also adopted a Resolution recommending that "in the case of a dispute relating to the interpretation or application of the present Conventions," the opposing Parties should attempt to reach agreement on referring the dispute to the International Court of Justice.[368] Nothing is more unlikely than that such an agreement could ever be reached; or, if it were, that the Court would be able to reach a decision before the ultimate cessation of hostilities!

The second method of resolving disputes between belligerents is the "enquiry" provided for in Article 132. Its value is difficult to estimate because there was no comparable provision in the 1929 Convention.[369] However, it appears to present built-in problems. The first paragraph of Article 132 provides that at the request of a belligerent an inquiry concerning any alleged violation of the Convention "shall be instituted." This has been construed by some as being "obligatory";[370] while others assert that the institution of an inquiry is consensual.[371] Inasmuch as this paragraph of Article 132 also provides that the inquiry is to be instituted "in a manner to be decided between the interested Parties," it is difficult to see how an inquiry can be instituted, or conducted, in the absence of agreement between the Parties.[372] Moreover, this conclusion is borne out by the next para-

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[365] *See, e.g.*, the agreements listed in note 39 *supra*.

[366] Janner, *Puissance protectrice* 51; Pictet, *Commentary* 125. The agreements referred to in note VII-67 *infra*, were reached by diplomatic correspondence, not by face-to-face negotiation. (It could not be ascertained how the agreement referred to in note 352 *supra* was reached.)

[367] Janner, *Puissance protectrice* 51.

[368] Resolution I, 1 *Final Record* 361.

[369] Article 30 of the 1929 Sick-and-Wounded Convention may be considered to be the progenitor of this article of the 1949 Prisoner-of-War Convention. It apparently was never used. Draper, *Recueil* 149; Pictet, *Commentary* 632.

[370] *Ibid.*

[371] 1971 GE Documentation, II, at 36.

[372] During the hostilities in Korea the Communists charged that the United States was using bacteriological weapons. 2 ICRC *Conflit de Corée*, Nos. 396–99, at 84–86. The United States proposed that an investigation of this charge be made

graph of Article 132, which attempts to establish a procedure to be followed should the opposing belligerents be unable to agree on the manner in which the inquiry is to be conducted. Under those circumstances the belligerents "should agree on the choice of an umpire who will decide upon the procedure to be followed." Once again, agreement between the belligerents is required; this time, agreement on a third party who is to set the procedure for the inquiry upon which the belligerents were themselves unable to agree. It seems rather unlikely that it will be any easier for the belligerents to reach agreement on the selection of an umpire with the far-reaching power to establish the inquiry procedure than it will be for them to reach agreement on the procedure themselves; and if they do not, the inquiry does not take place.[373] However, if a procedure for the inquiry is established, either by the belligerents pursuant to the first paragraph of Article 132, or by the umpire selected pursuant to the second paragraph of Article 132, the inquiry is conducted in accordance with that procedure; and if the inqury establishes a violation of the Convention, the third and last paragraph of Article 132 requires the belligerent found to be in violation of the Convention to repress the violation as quickly as possible.[374] Of course, if the inquiry determines that there has been no violation, no problem arises.

As has been indicated, the value of the provisions of Article 132 concerning inquiries is dubious. Realizing this, a proposal has been made for the creation of a "United Nations Commission of Inquiry into Breaches of the Humanitarian Conventions."[375] The functions of this Commission would encompass "investigating all complaints of violations during armed conflicts" of the 1899 and 1907 Hague Conventions, the 1925 Geneva Protocol, and the 1949 Geneva Conventions. For the reasons already set forth, the allocation of quasi-judicial functions of this nature to any body owing its existence to a political organization such as the United Nations is a procedure to be regarded with considerable apprehension.[376] There have, perhaps, been some

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by the ICRC. *Ibid.*, No. 406, at 89. The ICRC offered to conduct such an investigation, "subject to the agreement of both Parties." *Ibid.*, Nos. 407–11, at 89–93. The Chinese and the North Koreans did not answer the ICRC and the idea of an investigation was abandoned. *Ibid.*, No. 437, at 109.

[373] Lauterpacht–Oppenheim 395; Pictet, *Commentary* 632. For an example of the difficulty of securing an agreement between the adversaries for an inquiry (in the Middle East), see ICRC *Annual Report*, 1974, at 18–19.

[374] *See* Draper, *Recueil* 149–50. The last paragraph of Article 132 provides that "*the Parties to the conflict* shall put an end" to any violation established by the inquiry. (Emphasis added.) Presumably, one belligerent requested the inquiry because it believed that its adversary was violating the Convention. When this belief is established as a fact, it would appear that the belligerent so found to be in violation of the Convention would be the only one with the burden of repression.

[375] U.N., *Human Rights*, A/8370, para. 164.

[376] *See* pp. 18–19 *supra*.

United Nations fact-finding commissions that have determined facts on the basis of facts and not on the basis of politics; if so, such commissions are few and far between.[377] And even though the proposal referred to above would have the commission composed of "persons, independent of any government, and chosen because of their high moral character and their capacity to conduct inquiries in accordance with generally recognized judicial principles," qualifications closely resembling those previously suggested herein,[378] the overriding difference is that the present proposal would have the members of the commission selected by the political processes of the United Nations, a method not conducive to the selection of persons who will actually meet the stated qualifications.

At its final (1977) session the Diplomatic Conference considering the ICRC's 1973 Draft Additional Protocol to the 1949 Conventions adopted and included in the 1977 Protocol I a completely new Article 90 entitled "International Fact-Finding Commission." This Article, which is probably the longest and most detailed in the Protocol, creates a Commission of 15 members "of high moral standing and acknowledged impartiality," to be elected by the Parties every five years, with the Commission itself filling casual vacancies. The members are to serve in their personal capacity. The Commission may inquire into alleged grave breaches or other serious violations of the 1949 Conventions or the 1977 Protocol; may facilitate the restoration of an attitude of respect for the Conventions and the Protocol; and, in other situations, may institute an inquiry at the request of one Party and with the consent of the other Party or Parties concerned. The Commission is to function by Chambers consisting of five members plus one *ad hoc* member to be appointed by each side. (No nationals of the Parties may be included in the Chamber.) The Chamber may hear evidence submitted by the Parties; may itself seek evidence; and may carry out an investigation *in loco*. Its report is not to be made public unless the Parties so request. Unfortunately, the entire Article is subject to a provision (similar to the optional clause of the Statute of the International Court of Justice) requiring the filing of a declaration recognizing the competence of the Commission to act in relation to any other Party accepting the same obligation. It is not unlikely that many of the very Parties who have heretofore demonstrated their unwillingness to comply with the law of war, even that included in international agreements to which they voluntarily became Parties,

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[377] *See* the constructive criticism of the methods of fact-finding employed by one United Nations investigatory body in the humanitarian field in Carey, *UN Protection of Political and Civil Rights* 84–126. Other subsequent United Nations investigations continue to be subject to the same criticisms.

[378] *See* pp. 19–22 *supra*.

will decline to file a declaration accepting the jurisdiction of the Commission.

The settlement of disputes between opposing belligerents in international armed conflict is an inherently difficult process that will only be successfully accomplished when both sides consider such a result to be in their own self-interests; but however difficult it may be, and however weak the provisions of the Convention dealing with the subject may be, the mere fact of their existence may, on occasion, serve as the basis for negotiations leading to the settlement of a dispute. Certainly, this possibility more than justified their inclusion in the Convention.[379]

3. Prohibition against Renunciation of Rights

As we have seen, the penultimate paragraph of Article 10 prohibits certain agreements between belligerents when, because of military events, they are not able to negotiate on a basis of equality. Obviously, prisoners of war can never negotiate on a basis of equality with the Detaining Power. This truism was repeatedly demonstrated during World War II and it resulted in the adoption of Article 7 of the Convention, a provision that had no counterpart in any previous Convention dealing with the subject of prisoners of war.[380] In absolute terms, it prohibits them from renouncing any or all of the rights secured to them by the Convention or by any special agreement reached by the belligerents for their benefit.[381]

The belief that any new convention should provide that the rights secured to prisoners of war by that convention must remain inviolate and inviolable for the entire duration of the hostilities was evidenced

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[379] Article 121 also provides for an "enquiry," but of a different kind. The first paragraph of Article 121 mandates that the Detaining Power will itself promptly institute an official inquiry into every death or serious injury of a prisoner of war caused by another person, whether guard, prisoner of war, or stranger, as well as into every death the cause of which is unknown; the second paragraph of Article 121 requires the Detaining Power to notify the Protecting Power of the fact that the inquiry is being conducted and, upon its completion, to provide the Protecting Power with a copy of the report, together with copies of the statements of all witnesses; and the last paragraph of Article 121 requires the Detaining Power to prosecute any individual whose guilt is indicated by the inquiry. *See* p. 289 *infra*, and, particularly, note IV-128 *infra*. During World War II the Germans followed a procedure identical to that prescribed by the first two paragraphs of Article 121, at least with regard to British prisoners of war. *German Regulations*, No. 15, para. 114.

[380] Pictet, *Commentary* 87. *See* Flory, *Prisoners of War* 142–44.

[381] In *The Ministries Case* (667–68) the Tribunal found that the provisions of Article 6 of the 1907 *Hague Regulations* prohibiting the use of prisoners of war on work connected with the operations of war did not apply when the prisoner of war volunteered. The first paragraphs of Articles 50 and 52 of the 1949 Convention still permit limited volunteering in the work area. *See* pp. 231–233 *infra*. *See also*, Pictet, *Commentary* 90.

as early as the 1946 Preliminary Conference.[382] While this idea was, for some unknown reason, not specifically implemented by the 1947 Conference of Government Experts, it did appear as Article 6 of the ICRC draft submitted to the 1948 Stockholm Conference. That draft provided that "[p]risoners of war may in no circumstances be induced by constraint, or by any other means of coercion to abandon" any of the rights contained in the draft convention.[383] The Stockholm Conference deleted the words "be induced by constraint, or by any other means of coercion to abandon" and substituted the one word "renounce."[384] This was a wise decision, as the original draft did not prohibit voluntary abandonment of rights conferred by the rest of the draft convention and thus left it open for the Detaining Power to assert, in every case, that the prisoner of war's decision was voluntary and that no constraint or coercion had been used to assist him in reaching his decision abandoning the protections of the convention.[385] Subsequently, the ICRC raised the issue that throughout the convention being drafted obligations were imposed upon the Parties (really, upon the Detaining Power) while proposed Article 6 imposed an obligation directly on the prisoner of war himself; and it offered modifications that would have imposed the obligation in regard to renunciation on the Detaining Power rather than on the prisoner of war.[386] At the 1949 Diplomatic Conference several other amendments were also offered,[387] but none gained the necessary support and the draft article approved at Stockholm was ultimately accepted without change.[388] This provision, now Article 7, constitutes an absolute ban on even a voluntary renunciation by a prisoner of war of any of the rights conferred upon him by the other provisions of the Convention or by any special agreement entered into by his Power of Origin and the Detaining Power for his benefit.[389]

Article 7 is, unfortunately, an oversimplification of a complex matter and numerous problems concerning its application have already arisen, while others are apparent. Does it apply to the defector, the ideologist who, while a member of the armed forces of his own country, seeks out the enemy with the object of joining its armed forces to fight against his country? While disputed by some, it is difficult to understand how Article 7 can be meaningful if a Detaining

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382 1946 Preliminary Conference 70.

383 *Draft Revised Conventions* 55.

384 Revised Draft Conventions 54.

385 2B *Final Record* 18.

386 Remarks and Proposals 39; 2B *Final Record* 17; Wilhelm, Le caractère 561.

387 2B *Final Record* 17–18; Pictet, *Commentary* 89.

388 2B *Final Record* 28.

389 As aptly put by one writer: "Thus, prisoners of war are no longer protected only against the enemy; they are also protected against themselves." Pictet, *Recueil* 85 (trans. mine). However, *see* note 381 *supra*.

Power may permit a member of the enemy armed forces in its power, no matter how he so came to be, to volunteer for service in the armed forces of the Detaining Power.[390] Nothing would then prevent a Detaining Power from contending that *every* member of the enemy armed forces who came into its power was a defector who had never had but one thought—to leave the armed forces of his Power of Origin and to join the armed forces of the Detaining Power.[391]

The question of the extent of the coverage of Article 7 was directly raised during the armistice negotiations in Korea in connection with the problem of repatriation under Article 118. Is it a violation of Article 7 to permit a prisoner of war to reject repatriation and to seek asylum either in the territory of the Detaining Power, or elsewhere, when hostilities cease? The decision ultimately reached in that controversy, one that had the support of a large majority of the United Nations General Assembly as then composed, was that Article 7 was not violated if it could be established in a satisfactory manner that the prisoner of war was actually making an informed, voluntary, and personal choice.[392] It probably can be assumed that the decision made with respect to this matter in Korea has established a precedent with respect to the application of Article 7 to the repatriation of prisoners of war after the cessation of hostilities.[393]

4. Dissemination of and Instruction on the Convention

A convention on the treatment of prisoners of war is of little value if it is not known to and understood by two major groups: (1) those who are potential prisoners of war or who have actually become prisoners of war; and (2) those who are responsible for handling, guarding, and, in general, supervising the activities of prisoners of war on behalf of the Detaining Power.[394] Instruction in the provisions of the Convention thus serves a dual purpose: (1) it ensures that members of armed forces who fall into the power of the enemy will be aware, at least generally, of their rights as prisoners of war; and (2) it

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[390] *See* pp. 78–80 *supra.*

[391] The North Korean "reeducation" program and the South Vietnamese "Chieu Hoi" program almost went this far. *See* note 325 *supra.*

[392] *See* pp. 421–426 *infra.* One acknowledged expert in this field, who was an active delegate at the 1949 Diplomatic Conference, takes the position that to hold otherwise would be "a travesty of the purpose of that Article." Gutteridge, Re patriation 214.

[393] For a wide-ranging discussion of the prohibitions against changing the status of a prisoner of war, either in accordance with his desires, in accordance with an agreement between his Power of Origin and the Detaining Power, or by unilateral act of the Detaining Power, see Wilhelm, Status, *passim.* It does *not* discuss Article 7 of the Convention in the context of the Korean repatriation problem, probably because publication began in July 1953, while that problem was still *sub judice.*

[394] Concerning this latter category, see p. 165 *infra.*

ensures that the personnel of the Detaining Power who capture prisoners of war or who have the direct responsibility for the prisoners of war in its custody are aware of the rights and protections to which prisoners of war are entitled and the obligations in this regard that rest upon the Detaining Power's personnel.[395]

Article 84 of the 1929 Convention merely required that that Convention, in the native language of the prisoners of war, be posted in the prisoner-of-war camps so that it could be consulted by them.[396] The 1947 Conference of Government Experts considered this to be inadequate and suggested that the enlargement of that Article include a provision requiring the Parties to bring the stipulations of the Convention to the knowledge of the members of their armed forces.[397] In preparing the draft convention to be submitted to the 1948 Stockholm Conference, the ICRC thought it advisable to separate these two ideas.[398] With some amendments and editing, the new provision calling for dissemination of and instruction on the Convention became the first paragraph of Article 127 of the 1949 Convention. That Article contains three undertakings by the Parties: (1) the widespread dissemination of the Convention in their territories; (2) the inclusion of the study of the Convention in programs of instruction of members of their armed forces; and (3), if possible, the inclusion of study of the Convention in programs of instruction of their civilian population.[399]

Provisions such as those contained in Article 127 are, of course, absolutely indispensable inasmuch as a convention the contents of which are completely unknown, or are known only to a limited group in the Ministry of Foreign Affairs and, perhaps, in the Ministry of Defense, is obviously of no value whatsoever.[400] Moreover, with nations, as with individuals, there is frequently a great distance between the promise and the performance; and here, as in many other areas of the Convention, a good rule has been laid down but no provision has been made for ensuring that it is being applied, particularly

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395 During World War II the chairman of the Mixed Medical Commission functioning in the United States (concerning these Commissions, see pp. 411–412 *infra*) found that there was "a considerable lack of knowledge concerning the provisions of the Geneva Convention on repatriation and of [*sic*] sick and wounded prisoners of war." Rich, Brief History 502.

396 This is now found in the first paragraph of Article 41. *See* pp. 165–166 *infra*.

397 1947 GE Report 261.

398 *Draft Revised Conventions*, Articles 34 (at 76) and 117 (at 133).

399 The text of the Convention is to be disseminated in time of peace as well as in time of war. (The provisions of the first paragraph of Article 127 were adopted in almost identical form in Article 25 of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.*)

400 "In order to 'implement' the Geneva Conventions, not only their existence but also their contents must be fully known, especially by those responsible for application." 1965 Implementation 1.

in peacetime. In 1966, on its own initiative, the ICRC sent a memorandum on the subject to the 114 States then Parties to the 1949 Conventions and to their National Red Cross Societies, requesting information concerning the implementation of the first paragraph of Article 127. The responses received could not, for the most part, be considered as indicating a very widespread and heartfelt compliance with its provisions.[401]

The 1973 Draft Additional Protocol included a provision intended to remedy this situation. Article 72(3) provided that each Party "shall report" to the Depositary of the Conventions (Switzerland) and to the ICRC "at intervals of four years on the measures they have taken" to comply with the obligations of dissemination and instruction assumed under the first paragraph of Article 127 of the Convention and under Article 72(1) of the Protocol.[402] Such a provision might well go far beyond its surface appearance in procuring a more universal compliance with the dissemination and instruction provisions.[403]

One aspect of the provision with respect to civilian instruction is worthy of note. Under the draft article submitted to and approved by the 1948 Stockholm Conference, the Parties would have undertaken "to incorporate the study [of the Convention] in their programme of military and civil instruction."[404] Because of the constitutional limitations of some Federal systems of government, under which civilian education is frequently not a Federal function,[405]

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[401] Twenty-five truly responsive answers were received. 1969 Implementation, II, at 9. A similar ICRC memorandum sent in 1972 inspired 30 responsive answers out of the 133 States then Parties to the 1949 Conventions. 1973 Implementation 5. A few additional answers were received later and were reprinted in two addenda.

[402] Committee I of the 1975 Diplomatic Conference approved Article 72(3) of the Protocol without change by a vote of 22–17–19. *See* 1975 Report of Committee I, at 29–30. At the 1977 session of the Diplomatic Conference the paragraph was eliminated in its entirety from what became Article 83 of the 1977 Protocol I.

[403] See note 402 *supra*.

[404] Revised Draft Conventions 99. Programs of instruction on the 1949 Conventions, and any Protocol thereto, for members of the armed forces present practical problems only, not legal ones. *See* the *Guidelines* developed by the *Seminar on the Teaching of Humanitarian Law to the Armed Forces*, 13 *I.R.R.C.* 42 (1973). *See also* the U.S. Department of Defense Directive No. 5100.77, 5 November 1974, DOD Program for the Implementation of the Law of War.

[405] Draper, *Recueil* 152. In Pictet, *Commentary on the First Convention* 349, the author asserts that "the propriety of [these constitutional scruples] *is open to question*," and in Pictet, *Commentary* 615, the statement is made that "[s]ome delegations, therefore, having a *scrupulous regard for constitutional niceties which may be thought unfounded*. . . ." (Emphasis added.) Without attempting to detract from the expertise of the author of those statements in the area of American constitutional law, it is fairly obvious that he is totally unfamiliar with the American doctrine of "states' rights" (and of the parallel Canadian doctrine with re-

Canada and the United States proposed, and the 1949 Diplomatic Conference accepted, an amendment changing the above-quoted wording to read, in pertinent part, "program of military and, *if possible*, civil instruction."[406] (Emphasis added.)

Finally, the 1973 Draft Additional Protocol introduced a completely new concept into the law of international armed conflict when it included, in its Article 71, a provision obligating the Parties to ensure that their armed forces have "qualified legal advisers," not only to act as legal advisers to military commanders, but also to "ensure that appropriate instruction be given to the armed forces."[407] While a number of armed forces have long included legally trained persons on their rolls, there are many who do not, or, if they do, presently have so few that they could not possibly perform the functions assigned to them by this provision.

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spect to the rights of provinces). If the Article of the Convention had remained as originally drafted, the United States Senate would, in all probability, have insisted that the ratification of the Convention by the United States include a reservation to it. (For the ICRC's persistence in this respect, see note 406 *infra*.)

[406] 2B *Final Record* 70, 112. Nevertheless, under Article 72(1) of the 1973 Draft Additional Protocol the Parties would have undertaken to include the study of the Convention "in their programmes of military and civil instruction." At the 1975 session of the Diplomatic Conference Committee I, perhaps more realistically inclined than the ICRC in this particular area, adopted by consensus an amended version pursuant to which the Parties undertake to include the study of the Convention in their programs of military instruction "and to encourage the study thereof by the civilian population." 1975 Report of Committee I, at 29–30. As so worded, the provision was adopted as Article 83(1) of the 1977 Protocol I.

[407] Committee I of the 1975 Diplomatic Conference adopted this article by consensus after making several amendments that improved it without changing the objective sought to be attained, 1975 Report of Committee I, at 29; *See* Fleck, The Employment of Legal Advisers and Teachers of Law in the Armed Forces, 13 *I.R.R.C.* 173. With only minor changes this provision became Article 82 of the 1977 Protocol I.

CHAPTER II

THE REGIME OF THE PRISONER OF WAR

A. INTRODUCTORY

In general, each of the successive conventions containing provisions for the protection of prisoners of war, beginning with the unratified 1874 Declaration of Brussels and concluding, at the moment, with the Third 1949 Geneva Convention, has been somewhat more sophisticated in its coverage of the day-to-day life of prisoners of war, the protections afforded to them, and the obligations imposed upon them. The purpose of this chapter will be to analyze generally those protections and obligations that now devolve upon prisoners of war "from the time they fall into the power of the enemy and until their final release and repatriation."[1] To the maximum extent possible, this analysis will be presented on a completely functional basis, avoiding for the most part the usual article-by-article discussion, thus bringing together and correlating all of the numerous provisions throughout the Convention which deal with any particular facet of the regime of the prisoner of war.[2] We shall join the enemy soldiers at the moment of their capture, accompany them on their evacuation to the rear, view their life in the prisoner-of-war camp, and witness their ultimate release and repatriation.[3] We should then have a fairly good understanding of the treatment of these unfortunate individuals which was probably contemplated by the great majority of the draftsmen of the 1949 Convention as well as, in some areas, the very different kind of treatment which they probably will actually receive, at least from some Detaining Powers. We will thus be alerted to the strengths and the weaknesses of this great humanitarian international agreement to which most of the members of the world community of nations have subscribed.[4]

It is important to bear in mind that there are certain fundamental protections which are accorded to prisoners of war by the 1949 Convention during the entire period of captivity. Therefore, these protections are applicable whether the individual is still in the hands of

[1] Article 5.

[2] See Preface, p. v.

[3] As a few of the subjects will require extremely extensive discussions, they will merely be mentioned here and a whole chapter will thereafter be devoted to each of them.

[4] *See* Appendix B.

the capturing unit, is in the process of evacuation to the rear, is in an interrogation center, is in a rear-area permanent prisoner-of-war camp, is being transferred from one such camp to another, is in a labor detachment, or is in process of repatriation. These protections have, for the most part, been grouped together in the early part of the 1949 Convention. They include what are now such basic propositions as that prisoners of war are in the hands of the Detaining (enemy) Power, and not of the individuals who captured them, and that the Detaining Power is responsible for the treatment which they receive [first paragraph of Article 12]; that they must at all times be humanely treated and must be protected, particularly against acts of violence, intimidation, insults, and public curiosity [Article 13]; that they are entitled to respect for their persons and their honor [first paragraph of Article 14];[5] and that, subject to specific provisions relating to rank, sex, health, age, and professional qualifications, they must all be treated alike, and without adverse distinctions based on race, nationality, religious belief, or political opinions [Article 16]. The cited Articles also contain provisions which are specific, rather than general, in their application. Many of the provisions of these Articles, both general and specific, will be discussed at length at the point where such a discussion is deemed to be most appropriate.

B. FROM BATTLEFIELD TO PRISONER-OF-WAR CAMP

1. Evacuation from the Battlefield

A surprise attack overruns an enemy position. An enemy unit is surrounded and forced to surrender. An enemy patrol is ambushed and its members are captured. A patrol succeeds in its mission and returns to its own lines with captured enemy personnel. These and many other incidents of war will result in the abrupt transformation from armed combatants to disarmed captives of officers, noncommissioned officers, and enlisted men, some of whom may be severely wounded, some of whom are less severely wounded, and some of whom are unhurt except for the mental shock which inevitably accompanies capture. The first paragraph of Article 5 specifies that the Convention

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[5] The advent in World War II of large numbers of women as combatant (or noncombatant) members of the armed forces, and the reasonable likelihood that this situation will also exist in future major international armed conflicts, necessitated the inclusion in the 1949 Convention of a number of provisions specifically dealing with this problem. Provisions of this nature are to be found in the second paragraph of Article 14, the last paragraph of Article 25, the second paragraph of Article 29, etc. A discussion of the overall problem and of the relevant provisions of the Convention will be found at pp. 178–180 *infra*. It will not be mentioned in the discussion of the various substantive problems which are applicable to all prisoners of war, regardless of sex. Because of the nominal and pronominal inadequacies of the English language, the words "men," "he," "his," and "him" should, where appropriate, be construed as including "women," "she," "her," etc.

applies to them "from the time they fall into the power of the enemy." This means that simultaneously with the transition from armed combatants to disarmed captives, there is a transition from armed combatants to prisoners of war and that, without any formal action or decision, the individuals whose status has thus abruptly changed are immediately entitled to the full protection and safeguards of the Convention. Thus, the 1949 Convention, like its predecessors, provides [in the first paragraph of Article 19] that these individuals must be removed from the dangers of the combat zone as soon as possible. There is, in addition, a prohibition against the holding of captured personnel in combat areas as a shield against enemy action.[6]

Certainly, no front-line combat unit would willingly permit itself to remain encumbered with prisoners of war, so that there is every incentive on the part of the capturing troops to secure their evacuation with the greatest possible dispatch, at least to the next higher command which has responsibilities for prisoners of war. But the evacuation of prisoners of war requires manpower for guards, and perhaps for transportation—manpower which the combat unit most probably will not be able to spare, at least until the battlefield area has settled down to a comparatively quiet state. It can scarcely be said that such a necessary delay in evacuating the newly captured prisoners of war would be violative of the 1949 Convention. As a matter of fact, the third paragraph of Article 19 apparently contemplates such a possibility, for it provides that "[p]risoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone." In other words, during the period which elapses before it is physically possible for the capturing unit to effectuate the evacuation of the prisoners of war, every effort must be made to place them at a location where they will be protected from the fighting so far as such protection is possible. Evacuation to the rear must take place as soon as it is within the capabilities of the capturing unit. The requirement regarding prompt evacuation of new prisoners of war is that they be evacuated "far enough from the combat zone for them to be out of danger."[7]

But even then not all of the new prisoners of war will necessarily be among those to be evacuated. The second paragraph of Article 19 authorizes the capturing unit to keep prisoners of war in the combat zone where, due to wounds or sickness, prompt evacuation would be

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[6] The first paragraph of Article 23 prohibits the capturing unit from detaining prisoners of war where they may be exposed to the fire of the combat zone, or in the combat zone or elsewhere in order "to render certain points or areas immune from military operations."

[7] Article 19, first paragraph. As a practical matter, in modern armed conflict there will be very few places where prisoners of war are completely out of danger. The Convention provision refers to the dangers of the battlefield itself.

more dangerous for their survival than retention in the combat zone.[8] Many modern armies have medical units which function very close to the front lines, performing emergency operations on badly wounded personnel where delay in rendering such assistance would probably be fatal.[9] In many armies wounded enemy personnel will receive the same type of emergency treatment as that side's own personnel and will only be evacuated thereafter.[10] Unfortunately, this humanitarian procedure is far from being universally followed.

Selected prisoners of war will undoubtedly be sent to higher echelon interrogation centers. Normally, such centers will be sufficiently far removed from the combat zone to constitute compliance with the provisions of the Convention with which we are here concerned. Prisoners of war may not be held in the combat zone by front-line units solely for purposes of interrogation. This is a prohibition which, however, is not always obeyed. We shall shortly see that this is not the only problem arising out of the tactical need for the prompt interrogation of newly captured prisoners of war.[11]

Assuming that the front-line unit is now in a position to evacuate to the rear the prisoners of war whom it has captured, the Convention contains provisions with regard to the manner in which such evacuation is to be performed, provisions with which, unfortunately, the front-line unit is not always in a position to comply, and through no fault of its own.

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[8] Article 14 of the First Convention (and Article 16 of the Second Convention) provides that enemy personnel captured while wounded or sick are prisoners of war and are entitled to the protections and safeguards of the Third Convention. *See* pp. 70–71 *supra*.

[9] In Korea, and even more so in Vietnam as more refined techniques evolved, the helicopter was used as a quick method of evacuating the seriously wounded directly from the battle field to medical installations. U.S. Army *Regs.* 633–50, para. 38, provides that the evacuation of wounded prisoners of war from the combat zone is to be through the same medical channels as those provided for wounded members of the United States armed forces. (Agreement was reached comparatively early at the Diplomatic Conference on the provisions of what is now the 1977 Protocol I with respect to medical air evacuation, a subject covered by Articles 24-31 thereof, and Articles 5-13 of Annex I thereof.)

[10] Early in 1942 it was already apparent that the then Japanese Government did not intend to comply with the humanitarian provisions of the law of war, including the 1929 Prisoner-of-War Convention, despite its specific promise so to do. However, on at least one occasion, when units of the Japanese Army overran an American field hospital on Bataan and found wounded Japanese soldiers receiving the same treatment as wounded Filipinos and Americans, they posted guards to protect the hospital, its personnel, and its patients. Falk, *Bataan* 92–94. Such action is, of course, required by the provisions of the first paragraph of Article 19 of the First Convention. For a quite different attitude toward an American field hospital on Bataan, see *ibid.*, 94–101.

[11] For a specific instance of violations of the Convention in connection with interrogations before and during evacuation, see Levie, Maltreatment in Vietnam 340–41.

It will be recalled that Article 13 of the Convention requires that prisoners of war must "at all times be humanely treated." This provision, of course, applies to the period of evacuation as well as generally. However, lest there by any doubt about this, the provision is specifically repeated with regard to evacuation in the first paragraph of Article 20 which states, in part, that "[t]he evacuation of prisoners of war shall always be effected humanely. . . ." But this latter Article goes even further because, due to the unique problems frequently encountered during the course of the original evacuation of prisoners of war from the front lines to the rear, it was felt necessary, and properly so, to establish certain specific minimum standards for general guidance.

In the first place, Article 20 requires that the evacuation be effected under conditions similar to those employed in changes of station for forces of the Detaining Power. This provision is obviously unrealistic. Front-line troops do not have available to them the physical facilities which are available for the movement of troops on change of station. The most that can be expected is that logistical vehicles which bring supplies forward may be available to move prisoners of war to the rear. If, as may frequently occur, the battlefield conditions are such that motor vehicle turnabout areas are located at a considerable distance to the rear, then prisoners of war are necessarily going to be required to march on foot at least to those areas; and upon their arrival there, they are going to be required to continue their march to the rear on foot if no vehicles are available at that point. Moreover, many armies are not adequately mechanized for the movement of supplies to forward areas.[12] Certainly, in line with what has already been discussed, it is to the advantage of the new prisoner of war to get away from the combat zone, and as far to the rear as possible, and as soon as possible, even if he must travel on foot—except, perhaps, insofar as the possibility of escape diminishes as he moves to the rear.

In the second place, the middle paragraph of Article 20 requires the Detaining Power to furnish an adequate amount of food, potable water, clothing, and medical attention during the course of the evacuation. There is no question but that humanitarian considerations of the highest order dictate that the prisoner of war should be adequately cared for in these material respects during the process of evacua-

[12] Only a comparatively few of the armies of today are what might be considered to be "adequately" mechanized. In Korea a million "volunteers" of the so-called Chinese People's Volunteers were supported logistically by a number of vehicles which the commander of a Western European army would probably consider insufficient for a single infantry division.

tion.[13] This can be a crucial period insofar as the ultimate survival of a prisoner of war is concerned. While most prisoners of war will survive an evacuation which is accomplished in a few hours or, perhaps, a day, evacuations which are performed completely by marches and which last a number of days or weeks take a disproportionately high toll—and usually unnecessarily so.[14]

In the third place, like its predecessors, the second paragraph of Article 20 requires the captors to "establish as soon as possible a list of the prisoners of war who are evacuated." The dual purpose of this provision—like a number of other provisions relating to identifications, notifications, and communications with the exterior (the homeland of the prisoner of war)—is (1) to establish the accountability of the Detaining Power for the prisoners of war whom it has taken; and (2) to permit families to receive definite information concerning the fate of their loved ones. Perhaps in order to avoid accountability, perhaps in the expectation that uncertainty with regard to the fate of husbands, sons, and fathers will adversely affect the morale and the will to continue the war of the enemy civilian population, some countries have either intentionally disregarded this provision or, having perhaps complied with it for their own use, have refused or neglected to comply with the later provisions of the Convention[15] which make the present provision meaningful by providing

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[13] In the preliminary discussions of this Article by Committee II (Prisoners of War) of the 1949 Geneva Diplomatic Conference, the representative of the ICRC (Wilhelm) referred to "the distressing experiences of the last war" which had occurred during the evacuation of prisoners of war. 2A *Final Record* 252. He was undoubtedly referring primarily to such well-publicized incidents as the "Death March" which followed the fall of Bataan. *I.M.T.F.E.* 1043–45; *ibid., Pal Dissent* 1171–72. Less wellpublicized atrocities of this nature were the subject of charges in a number of other war-crimes cases such as the *Trial of Masao; Trial of Heering* and *Trial of Mackensen.* According to one commentator, 35–40 percent of the Germans captured at Stalingrad died while being evacuated. Reiners, Soviet Indoctrination 18.

[14] Experiences during the hostilities in Korea indicate that the treatment of prisoners of war by the North Koreans and the Chinese Communists during the period of evacuation (as well as during the rest of the period of captivity) reached a new level in inhumanity. With regard to the prisoner-of-war evacuations by the Communists, one American investigating body had this to say: "The first ordeal the prisoner [of war] had to suffer—and often the worst—was the march to one of these camps. . . . So the journeys to the prison camps were 'death marches'. . . . On one of these marches, 700 men were headed north. Before the camp was reached, 500 men had perished." U.S., *POW* 8. *See also* U.S., *Communist Interrogation* 16–17. The Viet Minh followed the identical procedure with the French prisoners of war captured at Dien Bien Phu—and with equally fatal results. Fall, Indochina 7–9.

[15] Articles 122, 123, and 124. For a fuller discussion of this problem, *see* pp. 153–158 *infra.*

for the furnishing of the information contained in such lists of evacuees through neutral channels to the Power upon which the prisoners of war depend.[16] While it is true that front-line troops are rarely equipped to do administrative work, even a rifleman or truck driver or military policeman could perform the simple function of listing the prisoners of war whose evacuation he is supervising.[17] Moreover, this act of listing the prisoners of war being evacuated is actually of value and an advantage to the Capturing Power, as it is then in a much better position to account for prisoners of war who die or escape during the evacuation and thus to avoid charges of enslavement which have—and not without justification—been leveled against the countries which have failed to account for individuals who presumably were once prisoners of war in their hands.

Where the evacuation process takes place over a period of time, and intermediate stops are necessary, the last paragraph of Article 20 contemplates that such stops will be made at "transit camps" and directs that prisoners of war be held in such camps for as brief a period as possible. Experience has shown that these transit camps were frequently nothing but rude barbed-wire enclosures offering none of the required amenities such as protection from the elements, sanitary

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[16] These were among the many provisions of the 1949 Convention which the North Korean and Chinese Communists refused to implement during the Korean hostilities, despite an early promise by the North Koreans to comply with the Convention. In August and September 1950 the North Koreans furnished two token lists containing the names of 110 Americans taken prisoners of war early in the fighting. 1 ICRC, *Conflit de Corée*, Nos. 176 & 178. However, they thereafter refused all requests for further information of this kind, and the Chinese Communists never furnished any lists. During the armistice negotiations the United Nations Command demanded a list of all prisoners of war held by the Communists before it would embark on any discussion of the prisoner-of-war problem. It then developed that the Communists were completely unable to account for many thousands of members of the armed forces of the nations composing the United Nations Command and of the Republic of Korea, who were missing in action and many of whom had presumably been captured. It is probable that a majority of these missing individuals—for whom the Communists were never able to account—were among those who died on the evacuations marches, no lists of such evacuees having ever been made.

[17] It must be admitted that even a crude list may be well-nigh impossible of preparation at this level if the capturing troops and the prisoners of war use different alphabets, or if one uses an alphabet and the other uses ideographs. However, even this difficulty can be easily overcome by the use of the duplicate identity cards provided for in the third paragraph of Article 17. Thus, one of the members of the United States Delegation to the 1949 Geneva Diplomatic Conference has said: "This provision [for duplicate identity cards] offers an easy solution to the problem of hasty evacuation. The duplicates of each identity card may be collected prior to evacuation and they constitute a basis for a nominal roll. The provision that the identity card "may in no case be taken away from him" does not preclude the taking of the duplicate. The intent of the provision is that the prisoner of war shall at no time be without means of identification." Dillon, Genesis 50.

facilities, etc. Article 24 provides that where transit camps are used on a regular basis they must meet all of the conditions required of permanent prisoner-of-war camps and evacuees must receive the same treatment there as the 1949 Convention entitles them to in such permanent prisoner-of-war camps.[18] Unfortunately, there is little likelihood of general compliance with these provisions. Actually, in many areas of the world intermediate stops made during the course of evacuation will usually be made at what are merely convenient stopping points in that particular march, where no facilities whatsoever are available, and compared to which even a rough transit camp would offer considerable comfort.[19]

Finally, it must be pointed out that in at least one respect this particular facet of the 1949 Convention inexplicably contains less protection for the prisoner of war than did the 1929 Convention. The last paragraph of Article 7 of the latter Convention limited daily foot marches during the evacuation to 20 kilometers (about 12 miles) a day except in certain specified situations. No comparable provision is to be found in the 1949 Convention.[20] If this deletion was made because it was thought that future evacuations would be accomplished entirely by mechanical means, events have already disclosed the incorrectness of such an assumption.[21] While the distance fixed in the 1929 Convention as a maximum might have been considered as somewhat low (perhaps it was intentionally set low because of the number of walking wounded who will normally be among those evacuated on foot), there is little doubt but that some reasonable maximum should have been included, if for no other reason than to furnish the commander of the capturing troops with an international standard as a guideline for his own protection against subsequent charges of maltreatment of prisoners of war.

2. Transfer of Prisoners of War between Detaining Powers

One problem which may arise as early as the evacuation is that

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[18] The 1929 Convention had no provision establishing minimum requirements for transit camps. Those maintained by both sides in Europe during World War II were found to be grossly inadequate. 1 ICRC *Report* 245. The ICRC takes the position that a distinction must be made between the type of transit camp referred to in the last paragraph of Article 20, used for evacuations, and the more permanent type of transit camp referred to in Article 24, used for intercamp transfers. Pictet, *Commentary* 175–76.

[19] Of course, if the transit camp is located in the hinterland, remote from the combat zone, and is used primarily in connection with transfers between permanent prisoner-of-war camps, the applicability of Article 24 can scarcely be questioned.

[20] Its deletion was recommended by the 1947 Conference of Government Experts (1947 GE Report 128) on the theory that this type of protection would be covered by the broad principles that were to be included in the proposed new first paragraph of the article. The propriety of the action was not challenged at the 1949 Diplomatic Conference.

[21] The numerous deaths which occurred during prisoner-of-war evacuations by

relating to the transfer of prisoners of war from the custody of one Detaining Power (the Capturing Power) to another Detaining Power, an ally. Suppose, for example, that a small Belgian tactical unit, such as a battalion, is operating under attachment to a French division which is furnishing it complete logistical support. The Belgians capture a number of prisoners of war. They have no facilities for the evacuation of, nor prisoner-of-war camps to which to evacuate, these prisoners of war. In accordance with their overall logistical reliance on the French, the Belgians turn the prisoners of war over to the French for evacuation and custody. Which Power is thereafter responsible for ensuring that these particular prisoners of war receive the full protection accorded them by the 1949 Convention, the Belgians or the French?[22] The solution to this problem was sharply disputed at the 1949 Geneva Diplomatic Conference.[23] The Stockholm Draft which had resulted from the prior efforts of the ICRC provided for the joint responsibility of the Capturing Power and the actual Detaining Power.[24] The United Kingdom and the Netherlands had each submitted a memorandum prior to the convening of the Conference opposing joint responsibility and recommending that responsibility be placed solely on the actual Detaining Power,[25] basically because of the difficulty of enforcing joint responsibility, but also because of the likelihood of its causing friction between allies. The provision which was finally adopted, and which appears in the second and third paragraphs of Article 12, was a United Kingdom compromise proposal placing primary responsibility for the proper care and treatment of the transferred prisoners of war on the Power which accepts them, and which thereby becomes their Detaining Power (France, in our example), but pro-

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the Communists in Korea (see note 14 *supra*) were indubitably directly related to the daily marches of 50 and 60 kilometers which the prisoners of war were required to make, frequently in subzero weather and always with inadequate clothing, food, and water, and with no medical attention for the wounded and sick.

[22] The situation could, in fact, be far more complex than outlined above. *See* Baxter, Constitutional Forms 325. And, of course, the Power to whom custody is transferred must be a Party to the Convention.

[23] 2A *Final Record* 248–50; Dillon, Genesis 48; Pilloud, Reservations, *R.I.C.R. Supp.* 195–96.

[24] *See* Article 11, Revised Draft Conventions 56. The United States and the Soviet Union both supported this proposal. 2A *Final Record* 328. Although the 1929 Convention contained no provision concerning the transfer of prisoners of war from one Detaining Power to another, during World War II the United States had accepted the view that it continued to be ultimately responsible for the welfare of the prisoners of war captured by it whom it had turned over to the custody of its allies. Feilchenfeld, *Prisoners of War* 87; 1 *ICRC Report* 242, 336 & 544–45; Lewis & Mewha 240.

[25] Diplomatic Conference Documents: Memorandum by the Government of the United Kingdom, Document No. 6, at 5-6; Proposition by the Netherlands Government, Document No. 8, at 6.

viding that if the Protecting Power advises the Capturing Power (Belgium) that the transferred prisoners of war are not being treated as required by the 1949 Convention in some material respect, the burden is then on the Capturing Power either to see that the deficiency is corrected or to request the return of the transferred prisoners of war.[26] There is thus created the normal absolute responsibility of the actual Detaining Power and a type of contingent responsibility on the Capturing Power.[27] All of the Communist countries have followed the lead of the Soviet Union and have filed reservations to this provision of the 1949 Convention.[28] The Soviet reservation, which is typical, states that it does not "consider as valid the freeing of a Detaining Power, which has transferred prisoners of war to another Power, from responsibility for the application of the Convention to such prisoners of war while the latter are in the custody of the Power accepting them."[29]

3. Interrogation of Prisoners of War

From the moment of capture there also arises the problem of the extent to which the Detaining Power may seek or extract information from the new prisoner of war.[30] In Article 17 the 1949 Convention has attempted, to a rather limited extent, to remedy the deplorable situation in this regard which existed during World War II. However, this Article merely elaborates somewhat on its predecessor, Article 5 of the 1929 Convention; and like so many of the other provisions of the new Convention, the ultimate efficacy of the redrafted provisions will depend almost entirely upon the extent to which the belligerents direct and require compliance with these provisions of the 1949 Convention by their troops despite the not abnormal military expediency to the contrary.

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[26] This was, generally speaking, the manner in which the United States had acted during World War II (1 ICRC *Report*, 544–45) and it apparently voted in favor of the United Kingdom compromise proposal which was adopted. The Soviet Union did not. 2A *Final Record* 330–31.

[27] Yingling & Ginnane 407. The second paragraph of Article 12 requires that before making the transfer the Capturing Power must have "satisfied itself of the willingness and ability" of the proposed Detaining Power to apply the Convention.

[28] Shindler & Toman 483ff. For a discussion of the Soviet position, see Brockhaus, The U.S.S.R. 291.

[29] Shindler & Toman 505. One ICRC legal expert has stated with respect to the reservations to Article 12 that "this reservation cannot be considered as binding on States which have not made it. As it is not intended to limit or modify the obligations of the States which did make it, it constitutes in reality a unilateral declaration by those States, indicating the attitude which they will adopt if the situation arises. They are not entitled, however, to rely on the Convention itself to require that other States adopt the same attitude." Pilloud, Reservations, 11 R.I.C.R. Supp. 195–96.

[30] *See generally* Glod & Smith, Interrogation.

Prohibitions on the use of force to compel prisoners of war to divulge information to the enemy are not a recent development. They were already well established in 1863 when Lieber included in his Code a provision which stated that "the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information."[31] Oddly enough, Article 9 of the Regulations annexed to the Second Hague Convention of 1899 and to the Fourth Hague Convention of 1907, which were identical, each merely required the prisoner of war to give his "true name and rank" and provided for loss of privileges if he refused to do so—thus imposing obligations in this area on the prisoner of war, but none whatsoever on the Detaining Power. This defect of the Hague Conventions was soon recognized, and the special prisoner-of-war agreements negotiated by the belligerents during the course of World War I frequently remedied the omission with rather detailed restrictive provisions.[32] The 1929 Convention rectified the omissions of 1899 and 1907 but, unfortunately, its provisions were all too frequently disregarded; and, as has already been stated, the 1949 Convention does little more than to elaborate on some of the relevant provisions.

In order to ensure the correct identification of every prisoner of war the first paragraph of Article 17 of the 1949 Convention requires each of them to answer questions regarding his full name, rank, serial number, and date of birth.[33] Moreover, if the prisoner of war refuses to furnish these items of information to his interrogators, he may have restrictions placed on the privileges to which his rank or status[34] might otherwise entitle him,[35] unless his failure to respond is due to his

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[31] *Lieber Code*, Article 80. Article 130 of the 1949 Convention makes "torture or inhuman treatment" a "grave breach" of the Convention. For a discussion of this grave breach and its relationship to the interrogation of prisoners of war, *see* pp. 357–358 *infra*.

[32] *See, e.g.*, Article XXIX of the 1918 *Agreement between the British and German Governments concerning Combatant Prisoners of War and Civilians*.

[33] For a problem created by the disparity between the requirements of the first paragraph of Article 17 and those of the fourth paragraph of Article 122, see note 216 *infra*.

[34] The word "status" in the second paragraph of Article 17 refers to the categories of persons covered by Article 4A(4), such as war correspondents, who, while not actually members of the armed forces, are normally granted the status of officers if they are captured. Pictet, *Commentary* 159.

[35] For a list of these privileges, *see ibid.*, 159–60. The statement is also there made (at 159) that "[u]nder the Convention, a prisoner who wilfully makes an inaccurate statement or who refuses to give the particulars specified in the first paragraph [of Article 17] may be liable to 'a restriction of the privileges accorded to his rank of status". It is assumed that the "inaccurate statement" refers to one concerning identification. There is certainly nothing in Article 17, or anywhere else in the 1949 Convention, that makes it improper for a prisoner of war to give incorrect information on any subject other than identification.

physical or mental condition.[36] This, however, is the outer limit of the pressure which may be applied upon a prisoner of war incident to his interrogation.[37]

It must be borne in mind that nowhere does the 1949 Convention prohibit the interrogation of prisoners of war which goes beyond the items listed above.[38] Moreover, there is no prohibition against obtaining information from a prisoner of war by trickery.[39] What the fourth paragraph of Article 17 of the 1949 Convention does prohibit is the use of physical or mental torture, or any other form of coercion, to compel a prisoner of war to answer questions propounded to him; and it further provides that a prisoner of war who refuses to answer such questions may not be "threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind" because of his refusal.[40]

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[36] The penultimate paragraph of Article 17 specifies that if a prisoner of war is unable to provide the identifying material because of his physical or mental condition, he is to be handed over to the medical service and other means are to be used to establish his identity. Presumably this would include recourse to the identification card, identification tags, interrogation of other prisoners of war captured at the same time and place, etc. And the last paragraph of Article 17 requires that interrogations be conducted in a language understood by the prisoner of war being interrogated.

[37] In Korea a situation arose which had not been foreseen by the draftsmen of the Convention—prisoners of war who did not desire to be identified and who would give false names, switch identities, etc. Meyers & Bradbury, Political Behavior 221; U.S., MP Board, Korea, I, at 101.

[38] U.S. DA Pam 27-161-2, at 99. The laws or military regulations of the Power of Origin may provide sanctions against members of its armed forces who, as prisoners of war, respond to such interrogation; sanctions which, of course, will only be imposable subsequent to repatriation. Khadduri, *War and Peace* 129; Secs. IV and V, *Code of Conduct;* Sec. 29, U.S.S.R. Law of 25 December 1958. (While the Soviet law does not specifically refer to giving information to the enemy, a Soviet commentator on this section is quoted as stating that it requires the Soviet soldier who is taken prisoner of war to "sacredly protect military and state secrets." Ramundo, Soviet Criminal Legislation 81.) After the repatriation of prisoners of war from North Korea (1953), several American servicemen were court-martialed for informing against fellow prisoners of war. *See, e.g., United States v. Batchelor; United States v. Floyd; United States v. Dickenson.*

[39] In the notes on the *Trial of Killinger*, 3 LRTWC at 68, the following appears: "During his closing address one of the Defense Counsel made three submissions regarding the scope of the [1929] Convention. The first was that under the Geneva Convention interrogation was not unlawful. The second was that to obtain information by a trick was not unlawful, under the same Convention. The third point was that to interrogate a wounded prisoner was not in itself unlawful unless it could be proved that that interrogation amounted to what could be described as physical or mental ill-treatment. The Court expressed its agreement with these three principles." And in Pictet, *Commentary* 163–64, this statement is made: "Be this as it may, a State which has captured prisoners of war will always try to obtain military information from them. Such attempts are not forbidden; . . ." *See also* Flory, *Prisoners of War* 94; Spaight, *Air Power* 386; U.S. *POW* 58–61.

[40] After World War II there were a number of war crimes trials arising out of illegal interrogations of prisoners of war. *See, e.g., Trial of Killinger.*

The front-line unit which captures a prisoner of war will frequently, and understandably, attempt to exploit that event by seeking to obtain information from him concerning tactical positions and plans and order of battle before evacuating him to the rear. Psychologically, this is probably the most fruitful time to interrogate a prisoner of war because of the state of shock from which he will be suffering, and his fear of the unknown, including how he will be treated by the enemy in whose complete power he now so suddenly finds himself.[41] The capturing unit may seek such information without in any way violating the provisions of the 1949 Convention, provided that it does not use any form of coercion and provided that it evacuates the prisoner of war from the combat zone as soon as practicable.[42]

Certain prisoners of war (airmen, submariners, missilemen, nuclear specialists, etc.) may be considered as having important and unique intelligence value, and they will probably be evacuated through special evacuation channels and to special interrogation centers. It is this special type of prisoner of war, in particular, who was the victim of maltreatment of the most vicious nature during World War II, both in Germany and in Japan.[43]

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[41] It has been found that a prisoner of war is most amenable to answering questions when he is still suffering from the shock of capture. Toppe, German Methods 23. As long ago as 1936 the Soviet Army prepared a lengthy questionaire which was to be completed by the capturing troops so that it would be available during subsequent interrogations. Olson, Soviet Policy 110.

[42] In U.N. *Human Rights*, A/8052, para. 118, the statement is made that "one of the important rights of prisoners of war was that they should not be interrogated until they have been medically attended and were in a fit condition for interrogation." Without in any way condoning interrogation by withholding medical treatment from those who are in immediate need of it, or by brutal methods, no such "right" exists. *See* note 39 *supra*. Paragraph 119 of the United Nations report is even more unrealistic. It states, in part: "Other basic right of prisoners of war under interrogation would include the right, when possible, to some independent advice before interrogation; . . . He should have the right not to be interrogated incessantly or for unduly long periods of time, and should have the right to food and rest during periods of questioning." The interrogation of a prisoner of war in a search for tactical information of immediate urgency cannot be equated to the interrogation of an individual arrested for questioning in connection with the possible commission of a crime, as the United Nations report attempts to do.

[43] It will be a long time before any interrogators are able to match the cruelties inflicted upon captured American naval personnel at the Ofuna Naval Interrogation Center in Japan during World War II. *See* the *Schacht Statement*. The Nazis maintained a special interrogation center for all captured airmen (except Russians) at Auswerstelle West, Oberursel, Germany, but wile, rather than torture, was normally employed there. American Prisoners of War 3; U.S., *POW* 58–61; Glod & Smith, Interrogation 148. An opinion of the Judge Advocate General of the United States Army states that "truth serum" may not be used in interrogating prisoners of war. JAGW 1961/1157, 21 June 1961.

4. Property in the Possession of the Prisoner of War

Our discussion has so far dealt exclusively with the safety and well-being of the new prisoner of war—and this is certainly an area which the 1949 Convention emphasizes, and rightly so. By the fact of his capture the prisoner of war has lost his liberty for the duration of hostilities; but the Powers which drafted the Convention, and those which have since become Parties to it, have, presumably, by their ratification or adherence thereto, indicated that they entertain the humane belief that there is no reason why he should also be deprived of his health or his life. Indeed, they have gone a step further, taking the position that his loss should be limited to the temporary deprivation of his liberty and that even his property (and, as we shall see, his civil rights) should be protected. Here, too, the protection accorded to the prisoner of war begins at the moment of capture and continues throughout the period of captivity.

While it is only natural to expect that the prisoner of war will be thoroughly searched immediately upon his capture, both to ensure that he has no hidden weapons or other articles which might facilitate escape, and to ascertain whether he has in his possession any documents or other items of intelligence value, the Convention preserves to him his own personal property as well as certain types of equipment of military issue.

Once again we find that the provisions dealing with this subject in the 1949 Convention are basically mere elaborations of the cognate provisions of the 1929 Convention. It will therefore be useful to ascertain what defects, if any, were found to exist in this area during World War II and to see how these defects have been remedied, if at all.

Article 6 of the 1929 Convention protected the prisoner of war in the continued possession of "effects and objects of personal use," helmets and gas masks, identification documents, insignia of rank, decorations and objects of value.[44] Because it is impossible to foresee

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[44] The United States practice with respect to such matters during World War II is summarized as follows: "Each prisoner was searched and disarmed immediately upon capture and contraband articles were taken from him, including all equipment issued to him by his government, except clothing. He was permitted to retain his helmet and gas mask in combat zones. Contraband included cameras, binoculars, signalling devices, compasses, and such other articles as might be useful to him in an escape. All military papers, documents, maps, and diaries were retained for intelligence examination." Rich, Brief History 492. This statement was concerned with the implementation of *POW Circular No. 1*, para. 35 of which established four categories for personal property found in the possession of a prisoner of war at the time of his capture:

35. . . . Property found in the possession of a prisoner [of war] may be in one of four classes:

a. Personal effects which he may be allowed to retain.

b. Personal effects taken from him temporarily but returned as soon as practicable.

what weapons will be used in a future war, the Greek Government suggested that the provision for the retention of the helmet and gas mask be enlarged to include other protective devices.[45] This was accomplished by adding the words "and like articles issued for personal protection" to the former provision when it was redrafted into the first paragraph of Article 18 of the 1949 Convention. This added clause will cover such items as bulletproof vests, antiradiation garments, radiation badges, etc.[46]

It has already been noted that the 1929 Convention provided for the retention by the prisoner of war of any identification documents which he possessed. The third paragraph of Article 17 of the 1949 Convention now provides for the issuance by the Power of Origin of identity cards[47] in duplicate[48] containing all of the information as to identification that a prisoner of war is required to furnish his captors, and, if desired, the individual's signature and fingerprints[49] and any other information the particular belligerent may wish to include thereon; and also contains a specific prohibition against taking identity cards away from prisoners of war, a practice which had caused numerous problems during World War II.[50] The second paragraph of Article 18 contains the further provision that where a prisoner of war has no

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c. Personal effects which he is not permitted to retain while interned, including money and any article which may be used to facilitate escape.

d. Articles which he is not permitted to retain at any time and which will be confiscated.

For another type of classification, see Pictet, *Commentary*, 166 n.2.

[45] Diplomatic Conference Documents: Memorandum by the Greek Government, Document No. 11, at 8. The language actually adopted was suggested by a Canadian representative. 2A *Final Record* 251.

[46] During World War II none of the belligerents construed the provision concerning the retention of helmets and gas masks as applying once the prisoner of war had reached a permanent prisoner-of-war camp. *See* note 44 *supra*, and SPJGW 1944/6900, 5 July 1944. Whether this will continue to be a reasonable interpretation of the new provisions is doubtful, given the developments of modern warfare.

[47] However, entitlement to the status of prisoner of war does not depend upon the possession of an identity card. Nordic Experts 167–68. *See also* p. 62 *supra*.

[48] The provision of the 1949 Convention which calls for the individual to be supplied with two identity cards, rather than one, was proposed by a member of the United States Delegation to the 1949 Geneva Diplomatic Conference (Parker). 2A *Final Record* 251. He gave no reason for his proposal, which was adopted without discussion. *Ibid.*, 351. For a possible reason, see note 17 *supra*.

[49] For a discussion of fingerprinting, *see* pp. 118–119 *infra*.

[50] During World War II the ICRC found that some 26,000 German noncommissioned officers (NCOs) had had their identity papers taken from them in England, before being shipped to prisoner-of-war camps in the United States, with the result that they were denied NCO status and were required to work. 1 ICRC *Report* 339. *German Regulations*, No. 13, para. 54,specifically directed the confiscation of all identification papers "[i]n order to render escapes of prisoners of war more difficult." The United States Army considered this and other similar direc-

identity card, the Detaining Power shall supply him with such a document.[51] Thus three separate efforts have been made to prevent a recurrence of the situation which so frequently arose during World War II when prisoners of war were unable to establish their actual grade because their identification documents had been taken from them.[52]

During World War II a rather unusual situation arose with respect to the right of a prisoner of war to retain his uniform. There was no specific reference in the 1929 Convention to the right of a prisoner of war to retain his uniform or other items of clothing. However, this was apparently a generally accepted proposition. Nevertheless, German guards at prisoner-of-war camps were taking from prisoners of war certain uniforms which, with minimum changes, could be made to resemble items of clothing used by the civilian population and thus could facilitate escape, substituting other uniforms of the same belligerent which were less easy to convert. In July 1943 the German military command issued a directive prohibiting this practice.[53] Despite this directive, the practice seemingly continued because six months later it was called to the attention of the American military authorities, who expressed the opinion that the German guards were not acting improperly inasmuch as even personal and other specifically exempted property may be taken from a prisoner of war and impounded when

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tives to be contrary to the provisions of the 1929 Convention and to be without support in international law. SPJGW 1945/2868, 17 March 1945. Today such action would be a direct violation of the third paragraph of Article 17 of the 1949 Convention; and the second paragraph of Article 18 of the Convention would require the Detaining Power to replace the identity card which had been improperly taken.

[51] The United States Army has implemented this requirement with U.S. Army *Regs.* 633–50, para. 19, which directs that if a prisoner of war does not have an identity card, one will be issued to him.

[52] The United States Army apparently continues to take the position that prisoners of war who do not possess identification documents should be treated as privates (other ranks), although provision is now made for them to submit requests to their own governments for proof of their true grades. U.S. Army *Regs.* 633–50, para. 30.

[53] *German Regulations*, No. 27, para. 410, read as follows:

> The uniforms of prisoner of war officers, particularly French light infantry officers, French and British naval officers, and British aviation officers, have been frequently confiscated for reasons of security and replaced by others less objectionable as to cut and color. Such procedure is not permissible. The prisoner of war officer has a right to his uniform. It must be left in his possession even if it should make a stricter surveillance of the prisoner of war necessary.

it is of a character to facilitate escape.[54] The specific authorization for prisoners of war to retain "articles used for their clothing and feeding" even if they are of military issue, now included in the first paragraph of Article 18 does not appear to have changed the situation; and it is probable that this unwritten limitation on the protection of prisoner of war property rights continues to exist.[55] Thus, a prisoner of war might have an antique pocket watch with a compass in the stem. Even though such a watch falls within the category of "articles of personal use" [Article 18, first paragraph] or of "articles having above all a personal or sentimental value" [Article 18, third paragraph], which prisoners of war may normally retain, no Detaining Power could be censured for taking the watch and placing it in safekeeping until the owner is repatriated.[56]

Money in the possession of the prisoner of war at the time of his capture is placed in a category by itself. Article 6 of the 1929 Convention merely provided that money could only be taken from a prisoner of war by order of an officer, that a receipt had to be given, and that the amount taken had to be credited to the individual's prisoner-of-war account. These provisions were found to be inadequate to provide answers to the numerous problems which arose during World War II with regard to money so taken and it is doubtful that they have been resolved by the provisions of the 1949 Convention, despite the fact that the draftsmen were undoubtedly aware of these problems and did elaborate to some extent on the former provisions.

If the prisoner of war has in his possession at the time of capture a reasonable amount of the currency of the nation in whose armed forces he was serving at the time of his capture (the Power of Origin), no real problem arises. But what if he has an extraordinarily large amount of such currency? Or if he has currency of the Detaining Power? Or of third Powers, belligerent or otherwise? Or so-called invasion or occupation money, currency issued by his military authorities solely for use in a particular area? Each of these questions arose

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[54] In SPJGW 1944/2037, 11 February 1944, the view was expressed that "the German position [of confiscating leather flying suits and work coveralls on the ground that they would facilitate escape] is correct. There is an established principle in international law allowing the detention of articles useful in aiding espionage, or escape, even though they fall within the class of property that a prisoner of war may ordinarily retain. It is believed that that principle is properly applied in this case to the clothes in question which might well be taken for civilian clothes."

[55] U.S. Army *Regs.* 633–50, No. 24(a), permits the retention of their mess equipment by prisoners of war in accordance with the provisions of Article 18, but, nevertheless, specifically excludes knives and forks, items which could be used as weapons or tools.

[56] *Ibid.*, para. 24(b). This could in any event probably be justified under the fifth paragraph of Article 18, which permits the withdrawal of articles of value from prisoners of war "for reasons of security."

during World War II. None of them is really answered directly by the 1949 Convention.

As in the 1929 Convention, the fourth paragraph of Article 18 of the 1949 Convention provides that money may be taken from a prisoner of war only by order of an officer,[57] that a receipt must be given, and that the amount taken must be credited to the prisoner-of-war account which Article 64 of the 1949 Convention requires to be established for each individual prisoner of war. It has two additional features intended as protective devices: a requirement that the receipt be itemized and that it be "legibly inscribed with the name, rank, and unit of the person issuing the receipt"; and a provision for a "special register" in which the transaction is to be recorded at the time it takes place, with particulars as to the amount of money taken and the identity of the prisoner of war from whom it was taken. Unfortunately, no convention provisions of this kind can possibly be effective with the numerous rapacious individuals to be found in every armed force in time of war and who may happen to be the captors; and it is extremely doubtful if any newly captured prisoner of war, even one fully familiar with these provisions of the 1949 Convention, is going to be sufficiently assertive and courageous to question the act of his captor in taking his money and either not giving him a receipt, or giving him one which is completely indecipherable.

But let us suppose that the captor and searcher is one of the more honest individuals who probably constitute the great mass of the members of most armed forces. He finds that the prisoner of war has only a nominal amount of money on his person and that all of such money was issued by the Power of Origin. The appropriate receipt would be issued, the appropriate entry would be made in the special register, and subsequently, if so requested by the prisoner of war, the amount would be credited to his prisoner-of-war account; if no such request is made, the currency will be kept with other objects taken from the prisoner of war for safekeeping and will be returned to him at the time of his repatriation. No problems are encountered and the provisions of the 1949 Convention are fully adequate to cover the transaction.

Now let us suppose that this same captor finds that the prisoner of war has in his possession a sum of money in the currency of the Power of Origin many times in excess of that which he could normally be expected to have. There is much to be said for the position adopted by some Powers during World War II of requiring the prisoner of

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[57] In Pictet, *Commentary* 169, the suggestion is made that the officer need not actually be present, that he may instruct a clerk to carry out the operation, but that the officer remains responsible. As a practical matter, this is probably how the search for, and the removal of, money will be accomplished in the great majority of cases.

war to justify his possession of an inordinately large sum of money.[58] Article 18 is concerned with protecting the personal property of the prisoner of war and the portion of paragraph 4 thereof which is concerned with the giving of the receipt for money taken from a prisoner of war refers to the "owner." Under these circumstances, it is believed that the Detaining Power is warranted in requiring the prisoner of war to justify his possession of unusually large sums of money.[59]

A somewhat similar problem arises when the newly captured prisoner of war is found to be in possession of currency issued by the Detaining Power or its allies. There is rarely, if ever, any valid justification for a member of the armed forces of one belligerent having in his possession currency of an enemy belligerent. When he does, it usually indicates one of three things: that he has taken it illegally from members of the armed forces of the Detaining Power captured and searched by him before his own capture;[60] that he has looted the

[58] SPJGW 1944/11874, 3 November 1944, stated:

> 4. A prisoner of war is not entitled, under the quoted provisions of Article 6 of the [1929] Convention, to have all money found upon his person credited to his account. It is only money *belonging* to the prisoner of war that is to be so credited, and where a reasonable doubt arises as to ownership, the prisoner of war may be called upon for proof thereof. . . .
>
> 5. The possession by a prisoner of war of a large sum of cash likewise indicates the probability that such money is not his property. The practice of diffusing public funds among individuals when capture or military occupation impends is almost as old as war itself. . . .

To the same effect, see Downey, Captured Enemy Property 491–92. Substantially the same result was reached in *German Regulations*, No. 27, para. 395. The United Kingdom and the United States have both taken this same position in their post–World War II military manuals. *See British Manual* para. 141 nn.1 & 2; and *U.S. Manual* para. 94c. [The frequent similarities which may have been noted in these two manuals is no mere coincidence. *See* Baxter, The Cambridge Conference on the Revision of the Law of War, 47 *A.J.I.L.* 702.]

[59] At the beginning of the German offensive which later became known as the "Battle of the Bulge," an American division was overrun while its finance officers were in possession of several hundred thousand dollars in cash which had just been issued to them for payroll purposes. Most of these officers elected to burn or bury the cash in their possession before their capture. Had they decided to retain it on their persons, or to distribute it to a few trustworthy soldiers, it would still have been governmental, and not personal, funds. There would, therefore, have been no basis for not considering it to be "war booty," public property of one belligerent captured by another. Downey, Captured Enemy Property 491–92.

[60] Of course, it is possible that he has lawfully taken the money from prisoners of war in accordance with the provisions of the fourth paragraph of Article 18, given them the required receipt, and entered the transaction in the special register; and that he was himself captured before he had an opportunity to turn the money over to the appropriate authorities of his armed force. However, if such is the case, once again the fund belongs to his Power of Origin, not to the prisoner of war in whose possession it is found; and it is properly seized by the Detaining Power as war booty. (This does not affect the right of the original owner to a credit on his prisoner-of-war account; provided that the two belligerents concerned are able to overcome the administrative problems involved.)

bodies of the dead and wounded of the Detaining Power;[61] or that it has been given to him by his military authorities for subversive or other similar purposes. It is therefore somewhat surprising, to say the least, to find the the fourth paragraph of Article 18 provides that "[s]ums in the currency of the Detaining Power . . . shall be placed to the credit of the prisoner's account."[62] Just as there is no valid justification for his possession of enemy currency, so there is no valid justification for permitting him to profit from a possession which in all probability originally came about through illegal acts. Perhaps it will be possible to circumvent this undesirable result by requiring that here,too, the prisoner of war establish that he is, in fact, the "owner" of the currency involved.

The possession by a prisoner of war of the currency of a neutral Power is not immediately suspect as it is possible for him to be legitimately in the possession of this currency. However, the circumstances here are likewise such as to warrant an investigation. If it develops that the currency actually is the property of the Power of Origin, the Detaining Power may treat it as war booty and confiscate it.[63] If the prisoner of war establishes ownership, he may, pursuant to the last paragraph of Article 18, ask to have it converted into the currency

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[61] In SPJGW 1945/2240, 19 February 1945, the following statement appears:

> Since enemy governments do not pay their soldiers in United States money or issue it to them, the presumption is justified, in the absence of satisfactory evidence to the contrary, that United States money found in the possession of a prisoner of war at the time of initial search upon capture was unlawfully taken from an American soldier, living or dead. When United States money is found upon a prisoner of war at such time, an informal investigation will be made by an officer of the legality of his possession of it. As this is not a criminal but an administrative investigation, proof beyond a reasonable doubt is not required in order to decide the question either way. If the investigating officer concludes that the statement of the prisoner and other evidence (if any) presented by him outweighs the *prima facie* presumption above mentioned, the officer will give the prisoner a receipt for the money and deposit it to his credit in a trust fund account. Otherwise the money will be confiscated. . . .

See also German Regulations, No. 4, para. 13; and Rundell, Paying the POW 122.

[62] Similarly, Article 59 provides that "[c]ash which was taken from prisoners of war. . .at the time of their capture, and which is in the currency of the Detaining Power, shall be placed to their separate accounts"; and the first paragraph of Article 64 provides that the account of a prisoner of war shall be credited with "the sums in the currency of the Detaining Power which were taken from him." In this regard, *see* note 222 *infra*.

[63] During World War II aircraft crews were frequently furnished with "escape kits" containing currency of the countries over which they might fly, or which they might be able to reach if they were shot down. Obviously, they were not the owners of such currency and were not, and would not be, entitled to have it credited to their prisoner-of-war accounts. *German Regulations*, No. 39, para. 737. This would also be true as to the gold coins which were furnished to aircraft crews operating in certain parts of the world.

of the Detaining Power and credited to his account; otherwise it will be placed in safekeeping for ultimate return to the prisoner of war upon his repatriation.

Finally, there arises the question of the action to be taken by the Detaining Power with respect to "invasion" or "occupation" money, currency printed by the Power of Origin for use in a specific area and during a specific period, and which has no actual value. It is probably possible to dispose of this problem by considering such currency as falling within the ambit of the phrase "currency other than that of the Detaining Power" contained in the last paragraph of Article 18.[64] The Detaining Power would then unquestionably be justified in refusing any request for the conversion of such currency for credit to the prisoner-of-war account, and would maintain in safekeeping the very bills taken from the prisoner of war, just as it would do with any nonmoney "articles of value," returning them to the prisoner of war "in their original state" upon the termination of his captivity. This was the procedure followed by the Germans during World War II[65] and no objection was made to it, nor can any be perceived. While this currency may, at the later date, be completely worthless, this is a problem to be resolved between the individual and his Power of Origin, the nation which originally issued it.

From the foregoing, it is fairly apparent that while the 1949 Convention has added a few provisions intended to ensure that the new prisoner of war will be safeguarded in the possession of his money—the effectiveness of which will, as heretofore and necessarily, depend in large part upon the controls maintained by the Detaining Power upon its personnel—it has made no perceptible attempt to solve some of the technical problems which have previously arisen in this area and which will undoubtedly arise once again in any future major conflict. However, these are basically problems of administration which can probably be solved by a commonsense approach and by reciprocity.[66]

One other problem which has arisen with respect to the personal property of the prisoner of war is worthy of mention—his right to sell such property and the right of military personnel of the Detaining Power to buy it from him. Neither the 1929 nor the 1949 Convention has any provision relating to this problem.

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[64] If the "invasion" or "occupation" money was issued by the Detaining Power, the problem is the same as if it were actual currency of that Power.

[65] *German Regulations*, No. 43, para. 802.

[66] The provisions of the 1949 Convention just discussed are, of course, concerned solely with the problem of the disposition of cash found in the possession of a prisoner of war at the time of his capture. The more general problem of the finances of individual prisoners of war is discussed at pp. 194–212 *infra*.

In August 1944 The United States Army issued a circular which authorized its personnel to purchase articles from prisoners of war.[67] The British, on the other hand, took the view that because of the unequal bargaining positions of the two parties, to permit such purchases might be to open the way to abuse. Accordingly, British military personnel were subject to disciplinary proceedings if they trafficked with prisoners of war by way of the purchase or barter of the latter's personal property.[68] The United States has now accepted the British position and its post–World War II manual, like that of the United Kingdom, prohibits such transactions.[69] Presumably, this will not prevent military agencies, such as post exchanges, from buying and offering for sale items produced by the prisoners of war as a pastime, such as art work, handmade jewelry, novelties,[70] etc. Nor is there actually any basis for asserting a legal, conventional prohibition against the basic practice, potentially pernicious though it may be.

5. Fingerprinting Prisoners of War

Although the use of fingerprinting as a means of identification dates back to the late nineteenth century, the matter of fingerprinting prisoners of war did not arise until World War I. During that conflict the German Government protested against the United States practice of photographing and fingerprinting prisoners of war in its custody. The United States Government replied that it did not consider fingerprinting for the purposes of identification to be inhumane, humiliating, or disrespectful, and that it would welcome similar action by the Germans with respect to American prisoners of war held by them.[71] The

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[67] U.S. War Department Circular No. 353, 31 August 1944. It is reproduced substantially *in extenso* in Downey, Captured Enemy Property 500–02. The circular was based upon an opinion contained in SPJGW 1944/6900, 5 July 1944, which stated:

> There is nothing unlawful in a soldier of our Army picking up and retaining small objects found on the battlefield, or buying articles from prisoners of war, of the sort which, under the articles quoted, it is unlawful for him to take from a prisoner, the wounded, or the dead.

[68] Lauterpacht, Problem 380 n.1. One ICRC expert believed that while the practice could be dangerous, and that it would be preferable to prohibit it, the United States War Department circular was, on the whole, a satisfactory implementation of the relevant provisions of the 1929 Convention, particularly because it authorized each commander to take any measures he considered necessary to prevent violations of either the letter or the spirit of the Convention. Pilloud, Captured Enemy Property, 32 *R.I.C.R.* at 831.

[69] *U.S. Manual* para. 94b; *British Manual* para. 140 n.3.

[70] A visit which the author paid late in 1951 to the prisoner-of-war camps maintained by the United Nations Command at Koje-do in Korea revealed that the main occupation of many prisoners of war was the production for sale of a multitude of novelty items made from used tin cans. *See* Hermes, *Truce Tent* 236.

[71] [1918] *For. Rel. U.S.*, Supp. 2, at 35–38 (1933); 6 Hackworth, *Digest* 280.

1929 Convention again made no mention of fingerprinting. Nevertheless, during World War II both sides photographed and fingerprinted prisoners of war.[72]

When the Government Experts met in 1947 the question of fingerprinting arose, but only in connection with what became the penultimate paragraph of Article 17, concerning prisoners of war who, because of their physical or mental condition, were unable to furnish the required identifying information.[73] Even this limited reference to fingerprinting by the Detaining Powers was eliminated at the Diplomatic Conference without anything in the record to explain the reason for, or the meaning of, the action.[74] Presumably, it was felt that the phrase, "[t]he identity of such prisoners [of war] shall be established *by all possible means*" (emphasis added) was sufficiently broad to include the use of fingerprinting if the Detaining Power desired to employ this method of identification. Certainly, there is no indication that the draftsmen considered fingerprinting to be "inhumane, humiliating, or disrespectful." In fact, the indications are quite to the contrary, as the third paragraph of Article 17 provides that the identity card which a State is required to provide to its own personnel who may become prisoners of war may include fingerprints; and Annex 4A to the Convention,[75] the model identity card, provides space for both fingerprints and a photograph.[76]

There appears to be no question but that the United States construes the Convention as permitting both the fingerprinting and the photographing of prisoners of war. After the identification fiasco early in the Korean conflict,[77] prisoners of war were both photographed and fingerprinted.[78] The same procedure was followed in Vietnam.[79] Current regulations of the United States Army provide for the issuance of identity cards with photographs and fingerprints to prisoners of

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[72] Concerning the German practice during World War II, see Maughan, *Tobruk* 773; concerning the practice of the United States in Korea, see U.S., MP Board, Korea, I, at 101.

[73] 1947 GE Report 124. The fifth paragraph of Article 17, as approved at Stockholm, contained a final sentence which stated: "The identity of such prisoners [of war] shall be established by all possible means, *particularly by the taking of fingerprints.*" (Emphasis added.) Revised Draft Conventions 58.

[74] *See* 2A *Final Record* 350–51; 2B *Final Record* 173.

[75] *See* Annex 4A to Appendix A hereof.

[76] For some unknown reason, the draftsmen elected to refer Annex 4A of the Convention solely to Article 4 thereof (*see* Article 4A(4) and pp. 60–62 *supra*) which, of course, provides for the issuance of identity cards to "[p]ersons who accompany the armed forces without actually being members thereof." However, this is undoubtedly the identity card which would also be issued in compliance with the requirement of the third paragraph of Article 17.

[77] *See* note 37 *supra*.

[78] *See* note 72 *supra*.

[79] The subject was covered by a number of directives of both the Military Assistance Command Vietnam and the United States Army Vietnam.

war who lack such documents;[80] and the fingerprinting of *all* prisoners of war. [81] It is extremely doubtful that this procedure will engender any protests from enemy Powers of Origin. More probably, they will follow the same path if they have the technical competence to do so.

C. LIFE IN THE PRISONER-OF-WAR CAMP

We have seen our prisoners of war captured, searched, interrogated, and evacuated to the rear, perhaps through a transit camp. Now, what of their subsequent life as prisoners of war? The Detaining Power is, of course, specifically authorized to subject them to internment (Article 21); and, as a corollary to that right, it has the duty to provide them with maintenance and medical care without charge (Article 15). This combined right and duty relates to many of the usual problems of life: a roof over one's head and a place to sleep, food to eat, clothes to wear, protection against illness, care when sick, a way to pass the time when well,[82] etc., etc. And, wisely, the draftsmen of the 1949 Convention attempted to lay down specific minimum requirements on the Detaining Power in many of these areas, as well as in other areas which affect the day-to-day life of the prisoner of war. For our purposes, it will be necessary not only to analyze these various minimum requirements, but also to attempt to determine their probable adequacy in actual practice and the extent to which Detaining Powers may be expected to comply with them.

1. Establishment of Prisoner-of-War Camps

During the wars of the twentieth century it has been generally customary to intern prisoners of war in camps established for that specific purpose. The preliminary question as to where such prisoner-of-war camps may be located is itself of major importance. As we have already seen, the prisoners of war must be expeditiously removed from the dangers of the combat zone (Articles 19 and 23);[83] but this

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[80] U.S. Army *Regs.* 633–50, para 19b and Figure 1 (at 86).

[81] *Ibid.*, para. 20 and Figure 2 (at 87). The NATO directive on this subject provides for both photograph and fingerprints. STANAG No. 2044, Annex A.

[82] This latter item is more important than it might seem. Boredom and idle hands have frequently been the cause of the lack of discipline in, and many of the attempted escapes from, prisoner-of-war camps. Lewis & Mewha 57. Much of the disorder in the prisoner-of-war camps maintained by the United Nations Command at Koje-do unquestionably stemmed from the fact that the prisoners of war were not kept busy, a situation upon which Communist techniques battened. *See* note 70 *supra*.

[83] The problem of transfers from one prisoner-of-war camp to another is discussed at pp. 187–194 *infra*. However, it should be noted at this point that the second paragraph of Article 47 covers a situation which, depending upon the amount of territory available to a Detaining Power, may frequently arise in a war of movement—the approach of the combat zone to an established prisoner-of-

is not the only limitation on the Detaining Power's right to locate a prisoner-of-war camp where this can be most easily accomplished, or where it will be most usefully located as a ready source of labor. Article 22 of the 1949 Convention sets forth the general requirements and prohibitions governing the selection of prisoner-of-war camp sites. They must be located on land;[84] they must afford every guarantee of hygiene and healthfulness; they must not, except in unusual circumstances, be located in a penitentiary;[85] and they must not be in unhealthful areas, "or where the climate is injurious for them." If this latter contingency occurs, perhaps because the prisoners of war are originally interned in the region of the place of capture, they "shall be removed as soon as possible to a more favorable climate."

The problem of the climate of the place of internment has long been a source of difficulty.[86] During the Boer War (1899–1902), the actions of the British Government in transporting Boer prisoners of war to India, St. Helena, and Ceylon for internment were protested (by members of the British Parliament, by the Boer Government, and by the United States in its capacity as Protecting Power) because of the allegedly unhealthful climate in each of those places.[87] During World War I, the German Government protested against the French transfer of prisoners of war captured in Europe to Algeria and Morocco, again on the basis of allegedly unhealthful climates.[88] Article 9 of the 1929 Convention attempted to remedy the situation by providing that persons "captured in unhealthful regions or where the climate is injurious for persons coming from temperate regions, shall be trans-

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war camp. The cited article sets forth two alternative requirements, one of which must exist in order to justify the transfer of the prisoners of war from the threatened camp to another: that their transfer can be carried out "in adequate conditions of safety"; or that remaining where they are will expose them to even greater risks than will the transfer.

[84] This was formerly of more importance than it is now. During the Napoleonic Wars, for example, ship hulks were the usual place of internment for prisoners of war. Lewis, *Napoleon* 58–60. Nevertheless, the problem did arise again during World War II. 1 ICRC *Report* 248.

[85] Article 22 authorizes this where it is "justified by the interests of the prisoners themselves." During World War II the ICRC found at least one instance where the use of a penitentiary as a place of internment was considered to be to the advantage of the prisoners of war. *Ibid.*

[86] The United States exhibited concern in this regard and included provisions intended to alleviate the problem if it should occur as long ago as in its *Treaties of Amity and Commerce with Prussia* of 10 September 1785 (Article 24), and of 11 July 1799 (Article XXIV); and in Article XXII, paragraph II, of the *Treaty of Guadalupe Hidalgo* with Mexico of 2 February 1848. One pre–World War II author credits the provision of the 1785 Treaty with being the progenitor of the cognate article of the 1929 Convention. Meitani, Régime 26 & 29.

[87] Flory, *Prisoners of War* 46–47. In no case was the protest based upon the distance from the place of capture to the place of internment.

[88] *Ibid.*, 47.

ported, as soon as possible, to a more favorable climate." Obviously, this provision did not meet, and was not even directed at, the actions specifically protested in the previous conflicts, which involved transfers *from* the place of capture *to* an unhealthful region. On the other hand, in attempting to solve the problem to which it was related, it probably went too far. Problems of this nature were minimal during World War II, despite the fact that fighting was going on all over the globe,[89] and the changes made in drafting Article 22 of the 1949 Convention, which were not even the subject of floor debate, were probably not intended as changes in the substance of the provisions of the 1929 Convention.

The provisions of the 1949 Convention have been interpreted literally and as imposing upon the Detaining Power the obligation to transport prisoners of war from internment in a place where the climate is unfavorable for any reason,[90] even though it may have been the place of capture. When, for example, soldiers of a country located in a temperate climate are transported by their Government to fight against the armed forces of an equatorial nation and some are captured, can the Detaining Power be required to remove them from that area, its national territory, in order to intern them in a "more favorable" climate (which, normally, will be a climate more closely resembling that to which they are accustomed)? A literal interpretation of the second paragraph of Article 22 would require that this question be answered in the affirmative.[91] Or, if the troops from the temperate climate capture soldiers of the equatorial Power, would lack of adequate territory under their control, or problems of logistical support, justify transporting the prisoners of war to the national territory of the Detaining Power, even though this might mean interning them in a "less favorable" climate (less favorable in the sense that it will be one to which they are not accustomed)? A literal interpretation of that second paragraph of Article 22 would require that this question be answered in the negative.[92] It remains to be seen, but it ap-

[89] 1 ICRC *Report* 248.

[90] Pictet, *Commentary* 183.

[91] During World War II most of the Germans and Italians captured in Africa were ultimately transported to and interned in England, Canada, and the United States. Undoubtedly, this removal was, in the majority of cases, to a "more favorable climate" as far as those prisoners of war were concerned. However, it is equally without doubt that their removal was accomplished for the convenience of the Detaining Powers; that it was completely unrelated to the provisions of Article 9 of the 1929 Convention; and that it would have been made even had the result been otherwise.

[92] Of course, under these circumstances the requirements concerning climate might well run head-on into the requirement of Articles 19 and 23 concerning the removal of prisoners of war from the dangers of the combat zone and the numerous requirements relating to their maintenance. It would seem to the author that the requirement concerning climate is probably of lesser importance than the others, at least in the vast majority of cases.

pears extremely doubtful, whether, apart from exceptional cases, Detaining Powers of the future will so construe this provision.[93]

This problem of the location of prisoner-of-war camps raises a collateral, but related, question—should the enemy be advised of the location of camps in which captured members of its armed forces are interned, or should this information be withheld for military reasons? Two measures included in Article 23 of the 1949 Convention were intended to require that this information be divulged in order to afford protection to prisoner-of-war camps against unwitting attack by the armed forces of the Powers of Origin of the prisoners of war interned therein. The third paragraph of Article 23 requires that the Detaining Powers provide "the Powers concerned" (the Power of Origin of the prisoners of war and its allies) information as to the geographical location of prisoner-of-war camps; and the last paragraph of Article 23 provides that prisoner-of-war camps (and *only* prisoner-of-war camps) shall, "whenever military considerations permit," be marked with the letters "PW" (prisoners of war) or "PG" (*prisonniers de guerre*) so as to be visible from the air.[94] No such provisions were contained in the 1929 Convention, and prisoner-of-war camps were sometimes attacked by aircraft of the Power of Origin of the prisoners of war, or of its allies, unaware of the actual nature of the installation being attacked. While, at the urgent behest of the Protecting Powers and the ICRC, some belligerents permitted the furnishing of information as to the location of prisoner-of-war camps maintained by them to their enemies, others did not.[95] The substance of the provi-

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[93] In considering the question of climate, the draftsmen of both the 1929 and the 1949 Conventions appear to have had in mind primarily persons from temperate European countries or their equivalents, and only such widespread conflicts as World War I and World War II, where prisoner-of-war camps could be located in many areas of the globe; and to have given little, if any, consideration to nationals of other types of countries and to conflicts of a more limited territorial extent.

[94] One military pilot who was an Australian representative at the 1949 Diplomatic Conference stated that such markings would afford no protection whatsoever because of the height at which modern bombers fly and the speed at which low-flying aircraft travel. 2A *Final Record* 354. If this was true in 1949, and there is no reason to doubt the statement, it has become even more true in the light of subsequent technological developments. However, this alone should not be the basis for denying the prisoner-of-war camps this type of protection if it might possibly be effective in even a few rare instances.

[95] 1 ICRC *Report* 305–19. The British were particularly opposed to the required exchange of such information and at the 1949 Diplomatic Conference they adhered to their World War II opposition, pointing out that marking prisoner-of-war camps in a country with a relatively small geographical area had the effect of pinpointing military objectives. 2A *Final Record* 254, 347, & 354. It is rather difficult to understand why this opposition, which resulted in the inclusion of the clause "whenever military considerations permit" in the fourth paragraph of Article 23 did not extend to the preceding paragraph of that Article which requires

sions now included in the 1949 Convention were originally proposed by the ICRC. With the methods of electronic navigation and target finding developed after World War II, it is probable that if information as to the geographical location (longitude and latitude) of a prisoner-of-war camp is furnished pursuant to the third paragraph of Article 23, the need for marking in order to be able to identify such a camp from the air will be greatly reduced. If this is so, the "military considerations" limitation with respect to marking will not be too important.

2. Quarters

The physical requirements for prisoner-of-war camps are set forth in the first paragraph of Article 25 of the 1949 Convention which, basically, specifies that "prisoners of war shall be quartered under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area."[96] This obviously establishes each Detaining Power's national standard as its minimum international standard, the one which must be met by it under any and all circumstances. However, it is possible that the conditions under which the forces of the Detaining Power are normally billeted in an area are such that they would be detrimental to the health of prisoners of war accustomed to quite another standard. To meet this situation, the first paragraph of Article 25 continues with two added requirements: that the conditions according to which the prisoners of war are billeted must take into consideration their "habits and customs"; and that in no case shall those conditions be such as to be prejudicial to their health. While the desirability of these two additions to the Detaining Power's national standard can probably not be denied, it is extremely difficult to envision a situation wherein a Detaining Power would provide prisoners of war held by it with quarters superior to those provided for its own troops in the same area.[97]

The basic general requirements are enumerated in the first paragraph of Article 25, and the specifics are set forth in the second paragraph thereof. The requirement of conditions as favorable as those furnished the Detaining Power's own troops in the same areas means that dormitories for prisoners of war must have at least the same total surface and minimum cubic space, the same general installations (presumably

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the giving of "all useful information regarding the geographical location of prisoner of war camps." The ICRC construes this latter provision to encompass adequate information in order "to enable the camp to be pin-pointed on a map." Pictet, *Commentary* 190.

[96] This is referred to as the "principle of assimilation." *Ibid.*, 192 n.2.

[97] We will find that in other areas, also, the Convention establishes a better than national standard as the standard of treatment of prisoners of war. *See, e.g.*, note III-94 *infra*. Idealistic as its policies naturally are, the ICRC has, to some extent, also recognized this problem, Pictet, *Commentary* 194.

the same proportion of sanitary facilities such as washbasins, showers, toilets, washtubs, etc.), the same bedding, and the same number of blankets. Further, the third paragraph of Article 25 requires that the quarters furnished prisoners of war must be protected from dampness, must be adequately lighted and heated (particularly between dusk and lights-out, which is usually "free" time for the prisoners of war), and must have adequate precautions taken against the dangers of fire.[98]

Assuming complete compliance with the foregoing requirements, let it not be thought that the prisoner of war will be living in pampered comfort and luxury. Far from it! A Detaining Power can follow the provisions of Article 25 of the 1949 Convention to the letter and for many prisoners of war their quarters will still be barely more than marginal. Nevertheless, they will unquestionably afford comfort and luxury compared to those furnished where the 1949 Convention is not applicable, or where applicable not honored by a belligerent.[99]

It is appropriate to note that in addition to the requirements of the 1949 Convention aimed at physical comfort, there is also a very important provision aimed at physical protection. This is the second paragraph of Article 23, which imposes upon the Detaining Power the obligation of providing the prisoners of war with shelters against air bombardment and other hazards of war equal to those which are provided for its civilian population.[100] The same rule is applied to any other types of protection which are furnished to the civilian population.[101] Moreover, the prisoners of war must be permitted to avail themselves of the use of such shelters upon the sounding of the alarm, the only exceptions being those prisoners of war assigned to specific protective duties related to their quarters, presumably such as fire wardens, etc.

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[98] The second and third paragraphs of Article 25 of the 1949 Convention are little more than redrafts of Article 10 of the 1929 Convention. It has been stated on behalf of Switzerland, which acted as Protecting Power for some 34 countries during World War II, that there was general compliance with Article 10 during that conflict, except in the Far East and to some extent in Germany. Janner, *Puissance protectrice* 53–54. For statements of United States practice during World War II, see McKnight, POW Employment 50; Rich, Brief History 395.

[99] As a practical matter, only rarely will a new prisoner-of-war camp meet all of the physical requirements of Articles 25, 29, 30, 34, 38, etc., at the time of the internment there of the first prisoners of war. 1 ICRC *Report*, 248–49. However, the Detaining Power would be expected to exert itself to meet these requirements as soon as possible.

[100] Here, again, we have the national standard applied to prisoners of war—but the civilian standard, not the military, and with no provision which would require, under some circumstances, a better than national standard.

[101] Conceivably, this could include antiradiation garments, protective masks, decontamination chemicals and equipment, etc.

3. Food

Naturally, food is an extremely important part of the "maintenance" which the Detaining Power is required by Article 15 of the 1949 Convention to provide free of charge to prisoners of war.

Article 7 of the 1907 Hague Regulations provided that in the absence of a special agreement with respect to "board," prisoners of war should be "on the same footing as the troops of the Government who captured them." During World War I most of the belligerents found it necessary to negotiate special agreements covering, among numerous other subjects, that of food for prisoners of war. One such agreement provided that "the daily food ration which the prisoner of war receives ought not to be less than that of the civilian population [of the Detaining Power]"; but with the caveat that such ration would necessarily depend upon the availability of food in the country in which the prisoner of war was interned.[102] Other agreements adopted the formula of specifying the minimum daily caloric intake for prisoners of war, who were placed in three categories: nonworkers (2,000 calories); ordinary workers (2,500 calories); and workers performing strenuous labor (2,850 calories).[103]

When the 1929 Convention was drafted, a modification of the provision contained in the 1907 Hague Regulations was adopted. While retaining the ration of the troops of the Detaining Power as the standard for prisoners of war, it was specified in Article 11 that the "troops" referred to were those "at base camps" (*"troupes de dépôt"*). Experience during World War II disclosed numerous objections to this provision. Some belligerents had no "base" or "depot" troops to furnish the required standard.[104] Rations for the base troops of the different belligerents varied widely, so that it was possible for a Detaining Power to comply with the obligation imposed upon it in this respect and still have great suffering among the prisoners of war.[105] National diets also varied widely, so that the adequacy of the ration furnished when judged on a caloric standard did not always

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[102] *Final Act of the Conference of Copenhagen*, Title IV, Chapter III, Article I.

[103] Article 26 of the 1918 *Agreement between France and Germany concerning Prisoners of War*. (Article 27 of that Agreement provided that prisoners of war were to receive the same meat ration as the civilian population.) Article XLVI of the 1918 *Agreement between the British and German Governments concerning Combatant and Civilian Prisoners of War* contained a similar approach to the problem, with an additional specific provision with respect to the daily ration of bread.

[104] 1 ICRC *Report* 254.

[105] Thus a survey made after World War II disclosed that "during good times the Japanese base troops received approximately 1500 calories per day, the German base troops approximately 2500 calories per day, Italian base troops approximately 2300 calories per day, but American base troops receive approximately 3300 calories per day." Feilchenfeld, *Prisoners of War* 36.

ensure the maintenance of health.[106] Of course, the major problem in this area is that when war conditions and a blockade reduce a country's food supply to a bare subsistence level, or even lower, how can that country possibly be expected to meet the obligation which it has undertaken with respect to prisoners of war?[107]

The draftsmen of the 1949 Convention were fully aware of these many difficulties and attempted to meet them insofar as possible. The use of the "depot troop" ration as a standard was eliminated and the use of either a caloric or a national standard as a substitute was rejected. Instead of an absolute standard, the continued health of the individual prisoner of war was adopted as the standard. Thus, the first paragraph of Article 26 of the 1949 Convention provides that "the basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies." Moreover, it also contains a requirement that the Detaining Power take into consideration the "habitual diet" of the particular prisoner of war. While the overall effect of the first paragraph of Article 26, with its relative, rather than absolute or national, standard, will very probably turn out to be an improvement over that of its predecessor, it would be extremely naive to believe that even loss of health or weight, or the development of nutritional deficiencies, will cause the Detaining Power to increase and improve the diet furnished prisoners of war at a time when its own civilian population (and perhaps its armed forces) is subsisting on a substandard diet.

It has been suggested that the problem is not without solution and that there are, in fact, two remedial courses of action available to the

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[106] The experience in the United States during World War II was that there was actually a waste of food when the national dietary habits of the prisoners of war were ignored. Tollefson, Enemy Prisoners of War 57. The United States included such dietary habits in its regulations governing the furnishing of rations for prisoners of war. *POW Circular No. 1*, para. 59; Mason, German Prisoners of War 207. So did the Germans. *German Regulations*, No. 11, para. 21. The American prisoners of war in Japanese hands were not so fortunate (*see* Kunz, Treatment 102) despite a proposal made by the United States on 13 February 1942 [10 *Dept. State Bull.* 146 (1942)] and a promise made by Japanese Foreign Minister Togo shortly thereafter. *I.M.T.F.E.* 1100–01.

[107] Feilchenfeld, *Prisoners of War* 13 & 39. Relief packages from the Power of Origin, allied States, neutral States, and international relief organizations (*see* Articles 72 and 73 and Annex III to the Convention, discussed at pp. 158–163 *infra*) can, of course, be extremely helpful in this regard. However, even these will not fully remedy the situation if the Detaining Power does as Germany did during World War II—consider that the receipt of food packages reduces *pro tanto* the obligation to furnish prisoners of war with even the substandard ration which it had previously been furnishing. 1 ICRC *Report*, 255. Maughan, *Tobruk* 796. The second paragraph of Article 72 of the 1949 Convention now specifically prohibits such action by the Detaining Power.

Detaining Power under these circumstances: (1) the transfer of the prisoners of war to another Party to the 1949 Convention pursuant to Article 12 of the Convention; or (2) repatriation pursuant to Article 109 thereof.[108] As any ally of the Detaining Power would probably also have less than the food supply required for its existing needs (otherwise it would already be furnishing direct assistance to the Detaining Power), the only possible transfer of the custody of prisoners of war which would avoid repatriation but would remedy the situation would be to a neutral nation. This could be accomplished under Articles 6, 109, and 111 of the Convention.[109] The prisoners of war would then, of course, be lost to the former Detaining Power and its allies, as a labor force but would be interned in a neutral country and would be equally unavailable to the Power of Origin. On the other hand, while a special agreement for repatriation pursuant to which the repatriated prisoners of war would be excluded either wholly or in part from further military service during the then current war could be negotiated under Articles 6, 109, and 117 of the Convention,[110] such an agreement would probably be difficult to reach inasmuch as it would at least add the repatriated prisoners of war to the labor force of their Power of Origin and, to that extent, would increase its war-making potential.[111]

While the internationally accepted obligation to provide prisoners of war with an adequate ration to maintain health is, of course, the major problem in this area of protection afforded to prisoners of war by the 1949 Convention, there are several related problems. It is obvious that to maintain the health of a prisoner of war performing heavy labor will require more food than to maintain the health of a prisoner of war who is performing work of a sedentary nature, or no work at all. Even though this will automatically increase the requirement on the Detaining Power under the relative standard already

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[108] Dillon, Genesis 45. A third possible course of action (relief shipments) is discussed at pp. 158–163 *infra*.

[109] The first paragraph of Article 6 provides for special agreements between the belligerents provided that such agreements do not "adversely affect" the prisoners of war concerned, "nor restrict the rights" conferred upon them by the Convention; the second paragraph of Article 109 provides for special agreements between belligerents for internment of longtime prisoners of war in a neutral country; and Article 111 provides for tripartite agreements between the Detaining Power, the Power of Origin, and a mutually acceptable neutral Power for the internment of prisoners of war in neutral territory. Concerning such internment, *see* pp. 413–416 *infra*. For a discussion of agreements between the opposing belligerents, *see* pp. 84–86 *supra*.

[110] Concerning Articles 6 and 109 see the preceding note. Article 117 provides that no repatriated prisoner of war "may be employed on active military service." *See* note VII–92, *infra*.

[111] It would undoubtedly also improve morale and the will to fight in the country to which the prisoner of war had been repatriated.

discussed, it was, nevertheless, made the subject of special provision. The second paragraph of Article 26 again adopts a relative standard to meet this situation, requiring the Detaining Power to provide prisoners of war who work "with such additional rations as are necessary for the labor on which they are employed." However, the first paragraph of Article 51 appears to adopt the national standard for civilian workers in similar work as the minimum standard.[112]

An adequate supply of drinking water can, at times, be even more important than food.[113] For this reason, the third paragraph of Article 26 contains the flat requirement that "sufficient drinking water shall be supplied to prisoners of war."[114]

The preparation and distribution of the food issued to prisoners of war is another aspect of the problem which it was felt necessary to cover with particularity in the 1949 Convention. Thus the fourth paragraph of Article 26 authorizes and requires the Detaining Power to use prisoners of war in connection with the preparation of their food (including both the food supplied by the Detaining Power and any other food in their possession, such as that received in relief packages, that purchased at canteens, etc.). The fifth paragraph of Article 26 requires the Detaining Power to provide adequate messing facilities; the third paragraph of Article 44 requires the Detaining Power to facilitate the supervision of officers' messes by the officer prisoners of war; and the second paragraph of Article 45 contains a similar provision with respect to the supervision by enlisted prisoners of war (noncommissioned officers and other ranks) of their messes.

Finally, there is one further very important provision of the 1949 Convention concerning food. The third paragraph of Article 87 prohibits collective punishments generally. Nevertheless, because of the

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[112] The first paragraph of Article 51 provides that working conditions, *including food*, "shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work." This, of course, establishes a national standard. Presumably, the Detaining Power would be expected to furnish the working prisoner of war with the higher of the two standards, relative under the second paragraph of Article 26, or national under the first paragraph of Article 51. Concerning the diet of prisoner-of-war patients, *see* note 129.

[113] In the French version of the 1949 Convention, Articles 20, 26 and 46 all use the term "*eau potable*." In the English version, the second paragraph of Article 20 refers to "potable water," but the third paragraphs of Articles 26 and 46 refer to "drinking water." It appears that this was merely careless draftsmanship. *See* 2A *Final Record* 347.

[114] During the "Death March" in the Philippines in April 1942, in semitropical heat, a great many deaths resulted from the lack of water—or from frantic attempts by the marching prisoners of war to obtain water. *I.M.T.F.E.* 1043–45. The requirement that the Detaining Power provide an adequate supply of water (and food) during such an evacuation is now specifically covered by the second paragraph of Article 20 of the 1949 Convention. *See* pp. 101–102 *supra*. The third paragraph of Article 46 contains a similar provision with respect to transfers between prisoner-of-war camps.

alacrity with which many Detaining Powers have had recourse to the reduction of food allowances as a method of punishing groups of prisoners of war for the alleged misconduct of some few of them, it was felt necessary to specifically prohibit collective measures with respect to food and the last paragraph of Article 26 so provides.[115]

4. Clothing

The first paragraph of Article 18 provides that captured prisoners of war may retain "articles used for their clothing." Article 27 elaborates upon the requirements imposed upon the Detaining Power with respect to the supplying of prisoners of war with clothing. This Article places upon the Detaining Power the requirement that it supply prisoners of war with "sufficient quantities" of clothing, allowance being made for "the climate of the region where the prisoners are detained." It further authorizes the issuance to prisoners of war of captured uniforms of the forces to which they belonged, if such captured uniforms are suitable for the climate in which they are to be used. Moreover, the requirement that clothing in sufficient quantities be supplied to prisoners of war is a continuing one, the second paragraph of Article 27 requiring that "regular replacement and repair" of clothing shall be assured by the Detaining Power. Finally, this Article makes provision for the issuance to prisoners of war by the Detaining Power of clothing appropriate to the work to which they are assigned.[116]

The provisions of Article 27 are substantially those contained in Article 12 of the 1929 Convention. Few problems arose during the course of World War II with regard to the issuance of clothing to prisoners of war. The main difficulty which did arise was that a point was reached in the war at which a number of countries found it im-

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[115] The last sentence of Article 26 of the 1949 Convention is actually a verbatim reproduction of the last sentence of Article 11 of the 1929 Convention; and the third paragraph of Article 87 of the 1949 Convention (prohibiting collective punishments generally) is an amplification of the provisions of the last sentence of Article 46 of the 1929 Convention. A violation of the provisions of the last sentence of Article 26 by a belligerent would, in most cases, constitute a violation of the relatively more important provisions of the first paragraph of Article 26. [During the rioting at Koje-do in Korea in 1952 (*see* note V-8 *infra*), in order to move recalcitrant Communist prisoners of war to smaller, more manageable, prisoner-of-war compounds where control by the Detaining Power could be reestablished, the military authorities of the United Nations Command made food available in the new, small compounds and refused to make it available in the old, large compounds. If the prisoner of war wanted to eat, he had to move to the new compound. The ICRC Delegate took the position that this was collective punishment involving food. The United Nations Command took the position that as food was available in the new compounds, to which the prisoners of war were free to move, there was no denial of food to them. Harvey, Control 142–43; Vetter, *Mutiny* 177.]

[116] This requirement is, in effect, reiterated in the first paragraph of Article 51.

possible to comply with the requirement for the issuance of adequate clothing. When this occurred, the Powers to which the prisoners of war belonged remedied the situation by sending uniforms through relief channels to the enemy prisoner-of-war camps. These shipments were made with the understanding that they were not to be considered as in any way releasing the Detaining Power from the obligations imposed upon it by the provision of the 1929 Convention and that the uniforms so furnished were to be regarded as a supplement to, and not as a replacement for, those which the Detaining Power was required to furnish. With the exception of Germany, the Detaining Powers concerned accepted and applied this principle.[117]

5. Hygiene and Medical Care

The maintenance of the health of prisoners of war is perhaps the major problem with which these Conventions are concerned.[118] The provisions of the 1949 Convention relating to this problem are numerous and detailed, and full compliance with them would unquestionably mean the survival of many prisoners of war who, under less favorable conditions, would succumb to the illnesses and diseases which are endemic in crowded prisoner-of-war camps. Unfortunately, however, here once again we find that, despite the broad coverage of the subject in the 1949 Convention, there are actually only a few instances where its provisions go beyond the limits of the predecessor 1929 Convention. Perhaps the draftsmen at Geneva felt that the provisions of the 1929 Convention in this area were adequate if complied with and only required minimum clarification in order to accomplish the desired purposes.

The basic provision concerning medical care is Article 15, which binds the Detaining Power to provide prisoners of war with "the medical attention required by their state of health." This provision is, of course, merely a general requirement containing no standards—but it sets the stage for what is to come. The detailed provisions with respect to the hygienic conditions which the Detaining Power is required to maintain and the medical attention which it is bound to provide to the prisoners of war are contained in Articles 29, 30, and

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[117] 1 ICRC *Report* 258. This limitation would appear to be rather meaningless. If a Power of Origin feels the imperative need to furnish clothing for its military personnel held as prisoners of war by the enemy because the enemy Detaining Power is itself completely unable to furnish that clothing, it accomplishes very little to assert that the Detaining Power is not relieved of its basic responsibility in this regard—a responsibility which it concededly is not in a position to meet. The problem here is quite different from that with respect to food. *See* note 107 *supra*.

[118] Obviously, the provisions of the Convention which are concerned with shelter, food, clothing, etc., are all of major importance in maintaining the health of the prisoner of war.

31.[119] It is primarily with the provisions of these Articles that we will be concerned.

Article 29 is substantially the same as Article 13 of the 1929 Convention.[120] It places upon the Detaining Power, in a number of specified areas, the duty to take all measures necessary to maintain a standard of sanitation which will "ensure the cleanliness and healthfulness of camps and . . . prevent epidemics."[121] Specifically, the Detaining Power must provide prisoners of war with clean and hygienic toilet facilities, accessible 24 hours a day;[122] bath and shower facilities and the time to use them; and, finally, water and soap in sufficient quantities both for their personal cleanliness and for washing laundry. Actually, the only substantive changes from the 1929 Convention are that the requirement that prisoners of war be provided with a suffi-

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[119] The health of the prisoner of war is also frequently referred to in the context of other problems, several of which have already been discussed and others of which will be discussed below. Thus, wounded and sick prisoners of war need not be evacuated from the battlefield immediately after capture [Article 19, discussed at pp. 99–100 *supra*]; health limitations are placed on the locating of prisoner-of-war camps [the first two paragraphs of Article 22, discussed at pp. 120–123 *supra*]; the quarters provided for prisoners of war must not be such as to be "prejudicial to their health" [Article 25, discussed at pp. 124–125 *supra*]; the food with which they are provided must be such as to keep them "in good health" [Article 26, discussed at p. 127 *supra*]; wounded and sick prisoners of war may not be transferred between prisoner-of-war camps [Article 47, discussed at p. 191 *infra*]; etc. *See also*, the provisions of the 1949 Convention setting the standards of medical care required for a prisoner of war who is the victim of an industrial accident or who contracts an industrial disease [Article 54, discussed at pp. 250–251 *infra*]; and outlawing acts which would "seriously endanger the health of a prisoner of war" and providing sanctions for so doing or for subjecting a prisoner of war to "physical mutilation or to medical or scientific experiments" or to "biological experiments" [Articles 13 and 130, discussed at pp. 358–360 *infra*].

[120] The fourth paragraph of Article 13 of the 1929 Convention is now found, in substance, in the second paragraph of Article 38 of the 1949 Convention.

[121] Article 29, first paragraph. During World War II the United States apparently discovered that the problem of general sanitation and personal cleanliness existed in both directions as it found itself obliged to issue a directive requiring prisoners of war to "observe all sanitary measures necessary to assure the cleanliness and healthfulness of camps and to prevent epidemics. Insanitary habits will not be tolerated." *POW Circular No. 1*, para. 68. Such a directive is unquestionably authorized by virtue of the Detaining Power's duty to ensure cleanliness. Pictet, *Commentary* 208.

[122] Article 29, second paragraph. In the discussion of this Article contained in Pictet, *Commentary* 207, the authors refer to the finding of the ICRC that during World War II toilet facilities ("conveniences") were frequently not accessible during the night, and then state that "the new Convention makes an express stipulation in this regard." As the provisions relating to this matter contained in the official French versions of the 1929 and 1949 Conventions are absolutely identical ("*jour et nuit*"), it is difficult to see how the implications of the *Commentary* statement can be justified. If a Detaining Power does not meet its obligations in this respect, it will be in violation of the provision of the 1949 Convention just as other Detaining Powers were in violation of the same provision of the 1929 Convention.

cient quantity of water for bodily cleanliness is increased to require the Detaining Power to provide both sufficient water *and soap,* not only for bodily cleanliness but also for washing personal laundry; and the further requirement that installations, facilities, and time also be provided to the prisoners of war for these purposes.[123]

The duty to take all measures necessary to prevent epidemics contained in Article 29 must not be overlooked. It is this duty which both obligates and authorizes the Detaining Power to provide prisoners of war with the inoculations and vaccinations needed to immunize them from the outbreak and spread of the numerous diseases such as typhus, typhoid, paratyphoid, cholera, smallpox, plague, etc., which have historically appeared where men were closely confined over long periods of time.[124]

The medical care and attention to which the prisoners of war are entitled and which the Detaining Power is obligated to give them is set forth in Articles 30 and 31. Basically, there is a dual coverage with respect to the problem of the ascertainment of the need of any individual prisoner of war for medical treatment. At least once a month every prisoner of war must receive "medical inspections." This "inspection" includes weighing and weight recording, determination of general health condition, technological tests to detect the presence of contagious diseases, etc.[125] The purpose of this procedure is obviously to permit the identification of ailments before the appearance of subjective symptoms, particularly those ailments which could

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[123] Article 29, third paragraph. The 1929 Convention stated that camps "shall be as well provided as possible" with baths and showers. The 1949 Convention contains the flat admonition that the camps "shall be furnished" with these facilities. This change would seem to have closed the loophole of self-excuse under which the Detaining Power might previously have attempted to justify failure to comply with the requirements of the Convention in this respect.

[124] The term "authorizes" is used intentionally. If a Detaining Power considers it essential to give all prisoners of war held by it, or all prisoners of war in a particular camp, a *generally recognized and medically accepted* immunization, even by force if necessary, such a procedure is entirely within its authority in the execution of its obligation to prevent epidemics among the prisoners of war in its custody. Of course, should the medication used not be one recognized and accepted by the medical profession generally, or should it be a known defective medication, the individuals involved on the part of the Detaining Power would lay themselves open to the charge that the prisoners of war were being used as human guinea pigs, in direct violation of the first paragraph of Article 13, and they would be subject to the sanctions of Articles 129 and 130. *See* the discussion of this subject at pp. 358–360 *infra.*

[125] Article 31. The United States contemplates a medical "examination" of every prisoner of war upon arrival at the prisoner-of-war camp and a monthly "inspection" by a medical officer which will include the recording of the weight of the prisoner of war. *POW Circular No. 1,* para. 66 and Figure 3. For a further discussion of the monthly "medical inspection" required by Article 31 and the monthly "medical examination" required by Article 55 in connection with the working prisoner of war, *see* pp. 219–221 *infra.*

be transmitted to other prisoners of war and which can exist and even enter the contagious or infectious stage without the ailing person being aware of his condition.[126] The other side of the coin, and the second aspect of the determination of the existence of a need for medical treatment, consists of the right granted to a prisoner of war by the Convention to seek medical examination on his own initiative.[127] The prisoner of war who believes that he has a condition warranting medical attention must be permitted to obtain such attention so that a determination may be made by qualified medical personnel as to the actual existence of an ailment, its identity if it does exist, and the treatment required. The addition of this provision in the 1949 Convention undoubtedly resulted from the problems in this area encountered by the ICRC during World War II.[128]

A second basic requirement in the medical field is that there must be an "adequate" infirmary in every prisoner-of-war camp. The size and capabilities of the infirmary will necessarily depend upon the manner in which medical care is organized by the particular Detaining Power—provided, always, that whatever the organization, it must be such as to provide the medical care required by the prisoner of war.[129] Thus, one Detaining Power might organize the camp infirmaries so as to provide only day-to-day medical care, with the sick or injured prisoner of war being transferred to a more elaborate medical installation outside the prisoner-of-war camp when his illness or injury requires more sophisticated treatment than is available at the local infirmary.[130] Under these circumstances, the Convention

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[126] This is similar to the efforts of voluntary civilian organizations during peacetime to have everyone submit himself regularly to the various technical checks for tuberculosis, diabetes, heart disease, etc.

[127] Article 30, fourth paragraph. This right is established negatively—by prohibiting the Detaining Power from preventing a prisoner of war from applying for medical treatment. There are certain merits in establishing prisoner-of-war rights through the medium of prohibitions on the actions of the Detaining Power where such a procedure is appropriate. The potential dangers inherent in this particular provision, whether stated affirmatively or negatively, and which were apparently overlooked or disregarded by the 1949 Diplomatic Conference, are discussed in connection with Article 55, at p. 220 *infra*.

[128] 1 ICRC *Report* 265. Even more reprehensible was the deliberate withholding by the Chinese in Korea of badly needed medical attention from prisoners of war who refused to accept the Communist ideological thesis—the so-called "reactionaries." U.K., *Treatment* 22.

[129] Article 30, first paragraph. The infirmary must also be capable of providing an "appropriate diet" for the condition for which the prisoner of war is receiving treatment.

[130] During World War II the United States pursued the following method of providing medical care at all levels: "The camp dispensary, under the supervision of the camp surgeon, held the usual daily sick call and gave the same infirmary treatment as afforded by any unit surgeon. Those in need of hospital care were sent to the station [camp] hospital. If need of specialized treatment or prolonged hospital-

specifically provides that the prisoner of war needing special treatment must be admitted to any medical installation, military or civilian, where the necessary treatment is available.[131] Other Detaining Powers might organize their camp infirmaries in such a manner that each of them would be completely competent to provide any conceivable medical care which could be required by a prisoner of war—from first aid for a cut finger to heart or brain surgery.[132]

In addition to the foregoing basic requirements, there are a number of other provisions relating to medical care which, while not of general application, are certainly of major importance in the circumstances under which they are applicable. Thus, there are requirements that, if necessary, isolation wards must be established for the treatment of cases of contagious and mental diseases;[133] that a prisoner of war whose condition is such as to require special medical treatment or a special operation must be given such care even if his repatriation is imminent;[134] that special facilities must be established for the care and rehabilitation of the disabled (presumably amputees and those who have suffered some similar disabling condition), and particularly of the blind;[135] that the Detaining Power must, if requested by a prisoner of war, furnish to him an official certificate, and forward a duplicate thereof to the Central Prisoners of War Agency,[136] containing information with regard to the nature of the illness or injury for which he was treated, and the duration and kind of treatment received; and that the costs of medical treatment, including the costs of any necessary "apparatus" must be borne by the Detaining Power.[137]

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ization was indicated, prisoners [of war] were transferred to a general hospital." Rich, Brief History 409. The author was informed that in the Indian prisoner-of-war camps for Pakistani prisoners of war (1972–74), the retained Pakistani medical officers were permitted to perform only minor first aid treatment, more serious cases being sent, when space became available, to an Indian military hospital.

131 Article 30, second paragraph.

132 This is probably a more utilitarian method of operation for a very large concentration of prisoners of war, as it obviates the need for prisoner-of-war transfers from camp to outside hospital, for prisoner-of-war wards in hosiptals ill equipped for such an arrangement, etc. Moreover, there will frequently be sufficient prisoner-of-war or retained medical personnel (*see* discussion at pp. 70–73 *supra*) available to man a camp medical installation competent to provide complete medical services.

133 Article 30, first paragraph.

134 Article 30, second paragraph.

135 *Ibid.* The emphasis with reference to the blind resulted from the experiences of World War II and the belief that the sooner their rehabilitation began, the better their overall condition would be. 2A *Final Record* 259.

136 Concerning this agency, *see* pp. 154–158 *infra*. Similar provisions with respect to industrial illnesses and injuries are discussed at pp. 249–252 *infra*.

137 The second paragraph of Article 14 of the 1929 Convention provided merely that the Detaining Power would bear the costs of "temporary prosthetic equipment." The last paragraph of Article 30 of the 1949 Convention attempts to elaborate in this regard, specifying that the Detaining Power must provide "dentures

The third paragraph of Article 30, provides that prisoners of war shall, preferably, receive medical attention from the medical personnel of the power on which they depend (the Power of Origin) "and, if possible, of their nationality."[138] This provision, which has no real counterpart in the 1929 Convention, must be read in conjunction with Articles 32 and 33,[139] which specify the functions to be performed by captured medical personnel of various categories, some of whom have a basic right to be repatriated and may be retained by the Detaining Power only insofar as the needs of the prisoners of war may require.[140]

There is one other aspect of the problem of maintaining the health of prisoners of war which, although receiving comparatively little attention in the Convention, is of major importance. This concerns the availability of time and space for outdoor physical activities, such as calisthenics and sports. The first paragraph of Article 38 admonishes the Detaining Power to "encourage" the participation of prisoners of war in sports and games,[141] and obligates it to provide them with "adequate premises and necessary equipment." The second para-

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and other artificial appliances, and spectacles." While the intention of the draftsmen was undoubtedly to liberalize the provision by making specific references to dentures and spectacles, which had not always been provided by Detaining Powers during World War II (1 ICRC *Report* 266), the use of the phrase "dentures and other artificial appliances, and spectacles" to amplify the previous reference in the provision to "apparatus" may, in other respects, be found to be retrogressive. Does its use in place of "temporary prosthetic equipment" affect the obligation of the Detaining Power to provide artificial limbs for amputees? It is certainly to be hoped that no Detaining Power will so construe it—but Detaining Powers are not noted for the liberal construction of international conventions establishing their obligations to prisoners of war. It would have been much better had the term "prosthetic equipment" been retained in the enumeration in the provision of the Convention.

[138] This paragraph was the occasion for some discussion at the 1949 Diplomatic Conference. The representative of the United States emphasized the need for a prisoner of war to be able to communicate with the medical personnel who were treating him, while the representative of the United Kingdom believed that the prisoner of war should be treated by medical personnel from the armed forces in which he was serving when captured. 2A *Final Record* 472. The decision was reached to include both suggestions. *Ibid.*, 476 & 382.

[139] And also with Article 28 of the First Convention.

[140] For a discussion of "retained personnel," *see* pp. 70–74 *supra*.

[141] Article 38 opens with the words "[*w*]*hile respecting the individual preferences of every prisoner*, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games. . . ." (Emphasis added.) The italicized words were intended to constitute a prohibition on enforced attendance by prisoners of war at propaganda lectures, etc. *See* pp. 139–142 *infra*. Unfortunately, to be consistent, this means that the Detaining Power must also respect the individual preferences of prisoners of war who do not desire to exercise even though this can be only of benefit to their health. However, it is assumed that the Detaining Power would at least have the right to require attendance at morning calisthenics in the execution of its obligation to maintain the health of the prisoners of war.

graph of Article 38 provides that the prisoners of war shall have opportunities for these purposes and for being out-of-doors; and that sufficient open spaces shall be provided by the Detaining Power for this purpose in all prisoner-of-war camps.

It will thus be seen that the Detaining Power is obligated to provide the prisoners of war with (1) opportunities for physical exercise, including sports and games; (2) the equipment necessary for these purposes; (3) the open spaces likewise necessary for these purposes; and (4) opportunities to be out of doors.[142] During World War II it was found that when the Detaining Power made such opportunities available to the prisoners of war, it improved not only their health, but also their morale.[143] Unfortunately, there are times when it is simply beyond the ability of the Detaining Power to provide adequate and sufficient space for the purposes of exercise.[144] When this occurs, or when the Detaining Power fails to furnish the necessary space for its own reasons, the result will frequently be "barbed-wire psychosis," a mental condition which can be a greater drain on the resources of the Detaining Power than liberal compliance with the foregoing provisions of the Convention.[145]

6. Morale

The preceding discussion has been directed primarily toward the provisions of the Convention aimed at ensuring the physical well-being of the prisoner of war. Now let us direct our attention to a number of other areas which are also of vital importance in the maintenance of individual esprit and the will to live.

The importance of keeping a prisoner of war fully occupied, without time hanging on his hands, cannot be overestimated, both from the point of view of the Detaining Power and from the point of view

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[142] The comparable articles of the 1929 Convention (Articles 13, fourth paragraph, and 17) were lacking in detail and were nonmandatory. The provisions of the 1949 Convention in this area are a considerable improvement. (For a further discussion of some of the problems connected with physical exercise and organized sports, *see* note 141 *supra*.)

[143] 1 ICRC *Report* 264.

[144] It should be comparatively rare that the Detaining Power could not even provide an area sufficient for walking or jogging.

[145] For an example of complete noncompliance with most of the foregoing provisions of the Convention concerning life in a prisoner-of-war camp, see Bean, A Guest at the Hanoi Hilton, *The Retired Officer*, July 1973, at 28. Colonel Bean, a prisoner of war in North Vietnam for five years and two months, spent the first half of that period alone in a cell 7 by 8 feet in size, with no ventilation and very little light; was fed "a small loaf of bread and watery soup" twice a day; received only 2½ coffee-size cups of water a day; was provided with a "convenience" consisting of a bucket in his cell; and during 25 months was allowed out to "exercise" on only 37 occasions (an average of once every 20 days), each time for a period of 3–5 minutes. *See also* notes VI-35 and VII-94 *infra*.

of the prisoner of war himself. Keeping the prisoner of war fully occupied solves many disciplinary problems for the Detaining Power and, in many cases, it is all that makes life in a prisoner-of-war camp supportable for the prisoner of war. The Detaining Power may, within the limitations of the Convention, require prisoners of war to perform certain types of labor,[146] but this alone is not the full story. There are many hours in the day other than those during which the prisoner of war will be performing the labor required by the Detaining Power. Some of these will be occupied in sleeping, eating, bathing, doing personal chores, etc. The Convention indirectly attempts to make specific provisions for the remaining hours. It is with this subject that we will now be concerned.

a. RELIGIOUS ACTIVITIES

Like Article 16 of the 1929 Convention, the first paragraph of Article 34 of the 1949 Convention provides for complete liberty in the exercise of religious duties, subject only to the requirement of compliance with the disciplinary routine of the Detaining Power.[147] New in this area is the absolute requirement of the second paragraph of Article 34 that "[a]dequate premises shall be provided where religious services may be held."[148]

As in the case of medical personnel, provision is made for the retention of chaplains for the purpose of ministering to the prisoners of war.[149] While so retained, they have the same status as retained medical personnel.[150] With respect to ministers of religion who were not engaged in their religious capacity while serving in their armed forces, special provision is now made in Article 36, permitting them to function as chaplains while in the custody of the Detaining Power and providing that they shall receive the same treatment as retained chaplains and that they shall not be required to perform any other

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[146] *See* pp. 225–240 *infra*.

[147] Certainly, no one would contend that religious services could be scheduled so as to conflict with morning roll call or to interrupt the workday.

[148] The enumeration in the first paragraph of Article 72 of the items which prisoner of war are allowed to receive through the post includes "articles of a religious, educational or recreational character which may meet their needs, . . ." This matter will be discussed at more length in connection with the overall problems relating to relief packages. *See* p. 160 *infra*.

[149] *See* the discussion of Articles 4C and 33, at pp. 70–74 *supra*. *See also* the restrictive provision of the last paragraph of Article 33.

[150] Various special agreements entered into during World War II authorized the retention of anywhere from one chaplain per thousand prisoners of war (United States–Germany) to four chaplains per thousand prisoners of war (Germany–South Africa). 1 ICRC *Report* 202. Article 2(a) of the Model Agreement on this subject, drafted by the ICRC pursuant to Resolution 3 of the 1949 Diplomatic Conference (1 *Final Record* 361), calls for the retention of one chaplain per two thousand prisoners of war. ICRC, *Model Agreement*.

work.[151] Finally, as a third source of spiritual advisers, when neither retained nor prisoner-of-war ministers are available, provision is made (in Article 37) for the designation—subject to the approval of the prisoners of war constituting the religious community, the Detaining Power, and, where appropriate, the local religious authorities of the religion concerned—of a local minister or, where permitted by the religion, a qualified layman, to perform the necessary religious functions for the prisoners of war of that religion. The minister or layman so designated is specifically required to comply with all of the regulations of the Detaining Power with respect to discipline and military security.

Details with regard to the functions to be performed by chaplains are contained in Article 35 which, generally, permits them to minister to prisoners of war "and to exercise freely their ministry among prisoners of war of the same religion." Special privileges available to them include the use of necessary transport for visiting prisoners of war outside the camp where the chaplain is himself confined, presumably where a group of prisoners of war have no other source of spiritual guidance;[152] and freedom to correspond, beyond the personal quota but subject to normal censorship, with the ecclesiastical authorities of the Detaining Power and with international religious organizations, on matters relating to his religious duties.[153]

b. INTELLECTUAL, EDUCATIONAL, AND RECREATIONAL PURSUITS

Provision having been made for the spiritual needs of the prisoners of war, the draftsmen of the 1949 Convention directed their attention to other types of activity: the intellectual, educational, and recreational.

Article 17 of the 1929 Convention merely provided that "so far as possible" the Detaining Power "shall encourage intellectual diversions . . . organized by prisoners of war." It is readily apparent that the foregoing provision did not impose any measurable obligation on the

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[151] There was no comparable provision in the 1929 Convention. During World War II many ministers and priests were found serving in the ranks as ordinary soldiers. The United States used them in their religious capacities, but, in most respects, continued to consider them to be prisoners of war. Lewis & Mewha 159, 160; Rich, Brief History 411.

[152] During World War II the allocation of chaplains to the various prisoner-of-war installations apparently caused some problems. 1 ICRC *Report* 274; Mason, German Prisoners of War 201. One method adopted in the 1949 Convention for reducing this problem for the future was to state specifically in Article 35 that they were to be "allocated among the various camps *and labor detachments.*" (Emphasis added.)

[153] This privilege should be read in conjunction with the first paragraph of Article 125, which authorizes the representatives of religious organizations, among others, to visit the prisoners of war and to distribute relief supplies.

Detaining Power. Moreover, it did not specifically preclude the Detaining Power from subjecting the prisoners of war to political propaganda and from attempting to convert them to its own ideology. During World War II a few Detaining Powers did construe the Convention provision as prohibiting such action on their part, at least to the extent that political propaganda, such as lectures on ideology, could not be forced on the prisoners of war through the medium of compulsory classes, although they considered that classes could be conducted on the basis of voluntary attendance.[154] However, this interpretation of the Convention provision, which was unquestionably extremely liberal, was not uniformly made.[155] Where it was applied, the system usually adopted was to permit the prisoners of war to organize their own intellectual activities, such as formal study courses, the publication of camp newspapers, the establishment and operation of camp libraries and reading rooms, etc.;[156] and to install radio loudspeakers, variously located, upon which would be broadcast programs selected by the camp authorities. In this latter instance, in order to maintain the policy of voluntariness, provision would be made whereby prisoners of war who did not desire to hear the broadcast material could turn it off.[157]

The Commission of Experts established by the ICRC to draft proposed revisions to the provisions of the 1929 Convention relating to the spiritual and intellectual needs of prisoners of war appreciated the necessity to be more specific in regard to the encouragement of intellectual, educational, and recreational pursuits by prisoners of war and attempted to redraft the Article to attain this objective. Conceding that some political propaganda on the part of the Detaining Power was inevitable, the Commission approved an ICRC suggestion for the inclusion of an additional provision covering the problem of

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[154] Thus, as early as March 1943, the decision was made by the United States that while there would be no legal objection to making information on American history and government, and the workings of democracy, available in prisoner-of-war camps, attendance at any lectures, classes, motion pictures, etc., on these subjects would have to be completely voluntary and that it would be unlawful to compel such attendance. SPJGW 1943/4248, 29 March 1943; Rich, Brief History, 544; Tollefson, Enemy Prisoners of War 67.

[155] The ICRC intervened to induce certain Detaining Powers to refrain from carrying on political propaganda among prisoners of war. This was deemed to be necessary in the case of the German authorities with Allied prisoners of war and in the case of the British authorities with Italian prisoners of war in India. 1 ICRC *Report* 251.

[156] *POW Circular No. 1*, para. 96; Lewis & Mewha 147, 160. By 1944 the program in the United States had grown to such an extent that prisoners of war were taking correspondence courses given by American colleges and universities and also courses specially prepared for members of the United States armed forces. Rich, Brief History 443.

[157] 1947 SAIN 13.

forced versus voluntary attendance at propaganda meetings.[158] Although the 1949 Geneva Diplomatic Conference did not completely agree with the terminology proposed, it did adopt substantially the proposal approved by the Commission. While once again stating the obligation of the Detaining Power to "encourage" the practice of intellectual, educational, and recreational pursuits, the draftsmen at the Conference agreed, without any controversy, that the first paragraph of Article 38—which has now become the relevant Article, and which again calls upon the Detaining Power to "encourage the practice of intellectual, educational, and recreational pursuits"—should open with the words "[w]hile respecting the individual preferences of every prisoner. . . ." Obviously, this clause was added in order to place it beyond dispute that a Detaining Power may not use compulsion on prisoners of war in this area.[159]

At the conclusion of World War II, when prisoner-of-war problems were being studied in depth, one commentator, while agreeing that prisoners of war should not be involuntarily subjected to political propaganda favoring the Detaining Power and detrimental to their own country, even had reservations with respect to permitting this type of activity on a voluntary basis. He pointed out that while the system would work where prisoners of war were receiving a sufficient quantity of food, to permit it where inadequate supplies of food were available might in effect result in a "no study, no eat" policy, the food allowances thus being used as a bribe to encourage, or even compel, attendance at propaganda classes and lectures.[160] The validity of his argument was fully demonstrated by what transpired in the prisoner-of-war camps maintained by the Communists in Korea during the 1950–53 hostilities in that country. While attendance at political indoctrination sessions in these camps were originally compulsory,[161] in time it became voluntary, with the so-called "progressives"—who attended such sessions regularly—receiving a substantially increased food allowance, and the so-called "reactionaries"—those who had proven immune to Communist blandishments—frequently receiving a food allowance which was far below the minimum subsistence level.[162] Nevertheless, it is believed that the policy contained in the 1949 Convention is a proper one and that the flagrant disregard thereof by the Communists in Korea, and elsewhere, does not warrant

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[158] *Ibid.*, 12.

[159] 2A *Final Record* 263.

[160] Feilchenfeld, *Prisoners of War* 45.

[161] Flory, Nouvelle conception 60; U.K., *Treatment* 4–10; U.S., *POW* 10–14. Nevertheless, the Communists complained bitterly of the *voluntary* system established in the prisoner-of-war camps by the United States Command. Hermes, *Truce Tent* 237. The fact that they did complain is indicative of the success that the voluntary program was having.

[162] *See* U.S., *POW* 10; U.K., *Treatment* 21–22.

denigration of the provision, but merely indicates that this is another area where, in the application of the provisions of the Convention, it is frequently necessary to rely largely on the good will and inherent desire to be law-abiding of the respective belligerents—even where some of them do not have a very good record of compliance with their voluntarily assumed international obligations.

In addition to their duty to "encourage" the prisoners of war to engage in intellectual, educational, and recreational pursuits, the Detaining Power also has an obligation under the first paragraph of Article 38 to "take the measures necessary to ensure the exercise thereof by providing them [the prisoners of war] with adequate premises and necessary equipment."[163] Obviously, more than time is required if prisoners of war are to be enabled to read, to study, to participate in sedentary games, to engage in musical activities, to produce entertainment, etc. They need places not subject to the vagaries of the weather in which to pursue these activities, and they need the items of equipment which are indispensable for many of them. The Convention places the basic responsibility for providing both premises and equipment directly on the Detaining Power. It places upon the Detaining Power a far more specific and measurable obligation than that which was contained in the parallel provision of the 1929 Convention which, as we have seen, merely obligated the Detaining Power to "encourage" these activites "as much as possible."

Here, once more, the problem arises as to whether the Detaining Power may consider the receipt of equipment in these categories (intellectual, educational, and recreational) in relief parcels or collective shipments as relieving it *pro tanto* from the international obligation which it has assumed.[164] There will obviously be considerably less excuse for such action by the Detaining Power in these areas than in the case of food. In any event, the prohibition against such a practice contained in the second paragraph of Article 72 is there stated to be applicable to *all* of the obligations of this nature assumed by the Detaining Power as a Party to the Convention.

c. PHYSICAL EXERCISE AND SPORTS

A third type of activity which contributes tremendously to the morale and well-being of the prisoner of war, and in many instances will so contribute to the exclusion of intellectual, and perhaps even spiritual, pursuits, is the opportunity for physical activities and organized sports and games. Both paragraphs of Article 38 impose new obligations on the Detaining Power in this area. As already noted in connection with intellectual, educational, and recreational pursuits, the

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[163] *See* note 148 *supra*. Article 80 likewise gives responsibilities in this area to the prisoners' representative, *See* p. 305 *infra*.

[164] *See* note 107 *supra*.

Detaining Power must now provide adequate premises and the necessary equipment. This obligation is equally applicable to physical activities. And the second paragraph of the Aricle imposes upon the Detaining Power the affirmative requirements of providing the prisoners of war with opportunities for taking physical exercise and for being out-of-doors, and of providing sufficient open space in every camp for these purposes. Once again, it is no longer left to the Detaining Power itself to determine its capabilities in this regard and what it considers to be "possible" on its part. All discretion is removed and the definite obligation is placed upon the Detaining Power to provide the prisoners of war with time and space for being out-of-doors, for physical exercise, and for sports and games. Actually, this will frequently contribute so much to the health of the prisoners of war as to substantially reduce the requirement for medical attention.[165]

d. CANTEENS

There is one further subject which contributes materially to the morale of the prisoner of war although it does not exactly fall within the general category of matters which we have just been discussing. This is the camp canteen, the store where the prisoner of war is allowed to purchase such ordinary items as may be available on the local economy, especially tobacco.[166] The existence of the canteen and the availability for sale of canteen-type articles has an affirmative effect on morale the extent of which is incalculable.

Provisions for the establishment of canteens in each prisoner-of-war camp are contained in Article 28 of the 1949 Geneva Convention. This Article represents a considerable elaboration of the predecessor provision, Article 12 of the 1929 Convention. For example, while Article 12 referred only to "food products and ordinary objects," the new provision includes "food stuffs, soap and tobacco and ordinary articles in daily use." Again, while Article 12 provided that prisoners of war would be able to obtain the named items "at the local market price," the new Article 28, in the first paragraph, affirmatively states that "the tariff [price list] shall never be in excess of local market

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[165] This is true only provided that the prisoners of war are receiving a sufficient food allowance to enable them to participate in physical exercise and sports. Inadequate diet reduces both the will and the power to indulge in activities which necessitate physical exertion; and the resulting reduced activity, while perhaps somewhat reducing the need for food, also reduces the ability of the body to fight infection.

[166] *See* note 172 *infra*. The canteens may typically also stock such other items as toilet articles; candy, crackers, soft drinks, fruit, and other food items; and, in some cases, even light beer (or wine), McKnight, POW Employment 52; Mason, German Prisoners of War 208. The inventory will, as noted below, depend entirely upon the state of the local economy.

prices."[167] And, while Article 12 provided that profits from the canteen "shall be used for the benefit of prisoners," the second paragraph of Article 28 not only so provides, but further specifies that "a special fund shall be created for this purpose,"[168] and that the prisoners' representative[169] shall have a right to collaborate in the management of this fund (as well as in the management of the canteen itself); and the last paragraph of Article 28 states that when a camp is closed, the balance of any such fund shall be turned over to an international welfare organization (presumably one such as the ICRC, and *not* a national Red Cross Society) to be used for the benefit of other prisoners of war of the same nationality as those whose purchases have created the fund.[170]

Of course, the stock available at prisoner-of-war canteens will depend largely upon the availability of canteen-type items in the territory of the Detaining Power. If there is, for example, a shortage of tobacco or soap or candy in the territory of the Detaining Power, there will likewise be a shortage of this item in the prisoner-of-war canteens. As in the case of food shortages, to expect any Detaining Power to maintain prisoners of war at a higher standard than that of its own civilian population is an excess of naiveté. Unfortunately, the Convention does not contain any provision covering this situation. Presumably, if any such item is rationed to the civilian population, prisoners of war should, by analogy to other Convention provisions, receive a comparable ration. The unfortunate omission of such a provision in

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[167] The author was told by a number of Pakistanis who had been held as prisoners of war in India that the Indian Government had given concessions to Indian entrepreneurs to operate the canteens on a profit-making basis and that the canteen prices were frequently four or five times that of the local economy.

[168] During World War II the German Government stated that "prisoner of war canteens are establishments of the Reich and that their operations (resources) represent economic income and expense of the Reich." *German Regulations*, No. 41, para. 769. While the exact meaning of this statement is somewhat obscure, the section heading is quite specific. "Tax on turnover of prisoner of war canteens." The United States, on the other hand, determined that as Federal instrumentalities, prisoner-of-war canteens were not subject to State taxes, such as sales taxes, and that their profits were to be used for the benefit of the prisoners of war. SPJGT 1943/10442, 12 July 1943; Rich, Brief History 415.

[169] Concerning the prisoners' representative, *see* pp. 293–307 *infra*. Under the third paragraph of Article 62 the pay of the prisoners' representative, and of his assistants, is chargeable against canteen profits.

[170] The United States went even further and provided that in general when prisoners of war were transferred from one camp to another, "a proportionate share of the value of canteen stock and the Prisoner of War Fund will be transferred" with them. *POW Circular No. 1*, para. 75. For details of the directive concerning the administration of the camp canteens by the United States during World War II, see *ibid.*, para. 71 *et seq.*; and Rich, Brief History 413. The last paragraph of Article 28 further provides that in the event of a "general repatriation" (cessation of hostilities?), accumulated canteen profits will be kept by the Detaining Power unless the Powers concerned otherwise agree.

the Convention is one which, it is to be feared, will offer an escape hatch to the Detaining Power so inclined.[171] To some prisoners of war, the failure of the Detaining Power to make tobacco available through the canteens will be as serious an omission as its failure to provide an adequate food allowance.[172]

7. Correspondence

The privilege of communicating with, and receiving communications from, his family is probably the greatest single factor in the maintenance of prisoner-of-war morale.[173] The recognition of its importance is illustrated by the fact that no less than 11 articles of the Convention are in some way concerned with this problem.[174]

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[171] This problem was discussed briefly by Committee II (Prisoners of War) at the 1949 Diplomatic Conference. The suggestion was there made that the present Article 28 should include a provision for special agreements under which the Power of Origin might supply the canteens if the Detaining Power was unable to do so. This suggestion was not favorably considered for two reasons: first, that the first paragraph of Article 6 already provided generally for special agreements between belligerents; and, second, that such a provision would encourage some Detaining Powers to refrain from stocking canteens. 2A *Final Record* 258–59. The first reason did not prevent the draftsmen from including in the same Article a provision which contemplates the possibility of a special agreement concerning the ultimate disposition of canteen profits. While there is considerable merit to the second reason, if shortages occur—as they inevitably will—there should be some established method, other than relief packages, for remedying the situation.

[172] The importance of tobacco to the prisoner of war is illustrated by its inclusion in the few items specifically listed in the first paragraph of Article 28, as well as by the provision in the third paragraph of Article 26 requiring the Detaining Power to permit the use of tobacco by prisoners of war. Speaking of the British and Australian prisoners of war in Singapore early in 1942, one author says that "after food, tobacco was the prisoners' main preoccupation." Caffrey, *Out in the Midday Sun* 226–27.

[173] During World War II the Central Prisoners of War Agency (concerning this Agency, *see* pp. 154–158 *infra*) received and forwarded almost 20 million communications from and to prisoners of war and civilian internees; and it estimated that this was only a very small proportion of the total of such mail. 2 ICRC *Report* 57.

[174] Articles 48, 69, 70, 71, 74, 75, 76, 77, 78, 98, and 108. Annexes IVB and IVC are also relevant, as are Articles 72 and 73. One well-informed writer has said: "One of the most bitter features of captivity is the ignorance of the prisoners [of war] of conditions and news in general of home." Dillon, Genesis 55. The reverse of this situation, the lack of the receipt of news of the prisoner of war by his family, is an equally bitter feature of captivity. During the hostilities in Vietnam the North Vietnamese took advantage of the prisoner-of-war hunger for news from home, and the family hunger for news of and from the prisoner of war, to use correspondence as a method of obtaining favorable propaganda. After a long period during which only a sporadic and extremely limited correspondence was permitted (*see* note 183 *infra*), arrangements were made for an antiwar group in the United States to act as North Vietnam's postal agent with respect to prisoner-of-war mail. 1971 Hearings 237–38; Sullivan, Prisoners of War in Indochina 305–06.

Pursuing the subject chronologically, Article 70 provides that as soon as possible and, in any case, not later than one week after arrival at a transit or prisoner-of-war camp, every newly captured individual must be given the opportunity to send a "capture card" to his family in which he may inform them of the fact of his capture, his address, and his state of health. At the same time he may send a somewhat similar card to the Central Prisoners of War Agency,[175] thus making doubly sure that the information reaches his family.[176] The Detaining Power is specifically admonished to expedite the forwarding of these capture cards and is prohibited from delaying their transmission. Provision is also made for the sending of this type of card whenever the prisoner of war has a change of address because he is hospitalized or transferred to another prisoner-of-war camp.[177] The first paragraph of Article 48 specifies that in this latter event the Detaining Power has an obligation to advise the prisoner of war of his new postal address in time for him to send the card to his next of kin.[178]

While the dispatch of the capture card is of extreme importance both to the prisoner of war and to his family, of at least equal importance to them is the right to communicate with some degree of regularity over the period during which the prisoner-of-war status

[175] A capture card "similar, if possible" to Annex IVB to the Convention is to be provided by the Detaining Power for use by the prisoner of war in notifying the Central Prisoners of War Agency of his capture. As no form is provided by the Convention for use by the prisoner of war in notifying his family of his new status, the suggestion has been made that the capture card sent to the family could consist of the back (message side) of Annex IVB and the front (address side) of Annex IVC 1 (the Correspondence Card). Pictet, *Commentary* 342 n.1. However, this would involve unnecessary duplication of information. All that is really needed is a card identical to Annex IVB with a blank address side on which the prisoner of war could write the name and address of the member of his family to whom the information is to be sent.

[176] The second paragraph of Article 36 of the 1929 Convention contained a very similar provision with respect to the notification of the family. Although it contained no provision for a capture card to be sent to the Central Prisoners of War Agency, during World War II the ICRC succeeded in persuading a number of belligerents to adopt such a procedure, particularly because the capture cards usually reached the Central Agency in Geneva long before the lists officially submitted by the Detaining Power pursuant to what is now Article 122. 1946 Preliminary Conference 78–79. This procedure also made the information centrally available when a displaced family failed to receive the card addressed to it by the prisoner of war.

[177] Article 70 also provides for the dispatch of such a card "in cases of sickness." The meaning of this provision is unclear. Certainly, there was no intention to authorize the sending of such a card every time that a prisoner of war was on sick call because of a cold or some other equally routine ailment. Pictet, *Commentary* 341.

[178] The third paragraph of Article 48 imposes upon the Detaining Power the correlative obligation of promptly forwarding to the prisoner of war at his new camp all mail and parcels received at the former camp after his departure therefrom. *See* p. 193 *infra*.

extends, which may be a matter of years. The subject is covered, at considerable length, in Article 71 of the Convention which opens with the flat statement that "[p]risoners of war shall be allowed to send and receive letters and cards." This is the blanket provision and it is followed by a number of specific provisions, some of which restrict the authority of the Detaining Power, and some of which provide the Detaining Power with a limited leeway to impose some restrictions in this area.

The tenor of the Convention is that the Detaining Power will permit prisoners of war to write and send an unlimited number of letters and cards. However, it is appreciated that the transportation of a massive bulk of mail and the censorship of correspondence which will probably be written in a language foreign to that of the Detaining Power may create problems requiring the imposition of some numerical limitations. The Detaining Power is therefore authorized, when it is deemed necessary, to limit each prisoner of war to not less than two letters and four cards per month.[179] While Article 71 authorizes the monthly minimum, in exceptional cases, to be reduced below the foregoing figures, this may only be done when the Protecting Power (*not* the Detaining Power) concludes that it would be in the overall general interests of the prisoners of war to impose such a reduction because of the delay caused by the Detaining Power's inability to provide a sufficient number of translators to accomplish the necessary censorship without inordinate delay.[180]

One additional authorization for interference by the belligerent Powers with prisoner-of-war mail is contained in the third paragraph of Article 76, which permits a complete ban to be imposed, "either for military or political reasons," but with the admonition that such ban "shall be only temporary and its duration shall be as short as possible." Unfortunately, neither the drafting history of this provision (nor of its counterpart, the second paragraph of Article 40 of the 1929 Con-

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[179] The first paragraph of Article 36 of the 1929 Convention permitted Detaining Powers to establish numerical limits but did not provide for any specific monthly minimum. During World War II the United States at first permitted each prisoner of war to write and mail four letters and four cards per month. As the number of prisoners of war increased, the burgeoning censorship problem necessitated the reduction of this allowance to two letters and four cards per month. Tollefson, Enemy Prisoners of War 66–67. These same numbers were adopted by most of the belligerents. 1 ICRC *Report* 349. They have now been incorporated into the first paragraph of Article 71 of the Convention. (It should be noted that under the third paragraph of Article 78, letters of complaint addressed to the Detaining Power, the prisoners' representative, or the Protecting Power, are excluded from the count.)

[180] The sentence of the first paragraph of Article 71 which immediately follows the provision referred to in the text concerns the other aspects of the problem—mail *to* the prisoners of war. Here the limitations may be imposed only by the Power of Origin, "possibly at the request of the Detaining Power."

vention), nor any other provision of the Convention, discloses the intent and purpose of this authorization. It may be that it was included in order to enable the Detaining Power to put a blanket prohibition on prisoner-of-war correspondence prior to a major military operation which might otherwise be compromised by the many small bits of information which could be gleaned from such correspondence to form an overall recognizable pattern. However, the fact of the ban itself would probably be equally, or even more, revealing to the enemy intelligence service. So-called "disinformation" would probably be more effective than the total ban. And no justifiable "political reasons" can be envisaged for such a ban.[181] All in all, this provision appears to be an unwarranted and unnecessary one which can be used by an unscrupulous Detaining Power, at least for limited periods of time, to justify legally what is really a premeditated violation of major provisions of the Convention.

Detaining Powers have, on more than one occasion, used the denial of mail privileges for disciplinary purposes: either to punish for alleged misconduct, or to compel or reward certain desired conduct.[182] In the 1949 Convention every effort has been made to remove the mail completely from the disciplinary area. Thus: (a) the last clause of the first paragraph of Article 71 states that letters and cards "may not be delayed or retained for disciplinary reasons"; (b) the third paragraph of Article 87 prohibits collective punishment for the acts of individuals;[183] (c) the second paragraph of Article 89 provides that

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[181] Unlike the limitations on mail contained in the first paragraph of Article 71, which require the concurrence of the Protecting Power or of the Power of Origin before they may be imposed, the emergency limitations authorized by the third paragraph of Article 76 may apparently be imposed unilaterally by the Detaining Power.

[182] *I.M.T.F.E.* 1135; U.K., *Treatment* 21; Miller, *The Law of War* 245. Writing of the procedures with respect to mail followed by the Chinese in Korea, a psychiatrist said: "Loyalties to home and country were undermined by the systematic manipulation of mail. Usually only mail which carried bad news was delivered to a man. If he received no mail at all, it was pointed out to him that his loved ones must have abandoned him." Schein, Patterns, 257–58.

[183] Maughan, *Tobruk* 796. While it denied the applicabliity of the 1949 Convention to the American prisoners of war shot down over its territory (see note I-68 *supra*), North Vietnam made the following statement in a letter to the ICRC dated 31 August 1965.

> Authorization has been granted [to the captured American airmen] to correspond with their families. However, the regulations concerning mail with the exterior having been recently infringed, the competent authorities of the Democratic Republic of Vietnam have decided temporarily to suspend this correspondence. In future, if those concerned demonstrate their willingness to observe the regulations in force in the Democratic Republic of Vietnam, the competent authorities could reconsider the question with a view to finding an appropriate solution.

3 *I.R.R.C.* 528 (1965). Information concerning the nature of the "regulations" and

disciplinary punishment may include the discontinuance of only those privileges which have been granted by the Detaining Power "over and above" the minimum requirements stipulated in the Convention; (d) the first paragraph of Article 98 reserves to prisoners of war undergoing disciplinary punishment all of the benefits of the Convention; (e) the last paragraph of Article 98 specifies that prisoners of war undergoing disciplinary punishment shall have permission "to send and receive letters"; and (f) the third paragraph of Article 108 provides that prisoners of war serving sentences imposed after trial "shall be entitled to receive and dispatch correspondence."[184]

A problem with respect to correspondence may arise by reason of the fact that the languages of prisoners of war usually differ from that of the Detaining Power. The third paragraph of Article 71 of the Convention, like Article 36 of its 1929 predecessor, provides that, *as a general rule,* prisoners of war shall use their "native language" in their correspondence but that the Detaining Power may allow them to use other languages.[185] The italicized clause was undoubtedly included for the protection of the prisoners of war, as a ban on any attempt to compel them to correspond in a language other than their own.[186] Unfortunately, it has apparently also been construed as meaning that, while generally the Detaining Power will permit correspondence to be conducted in the native language of the prisoner of war, it may, in exceptional cases, dictate otherwise. Thus, during World War II, certain prisoners of war held by the Germans were required to conduct their correspondence in German, a language with which they were totally unfamiliar as were, presumably, their correspondents at home.[187] Of course, this was the same as prohibiting them from sending any mail. While such action on the part of the Detaining Power may not always be totally unwarranted, as it may have available for

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how and by whom they had been violated was not disclosed. Unless it was found that *every* prisoner of war had violated the "regulations," the North Vietnamese action was vicarious punishment in violation of the prohibition on collective punishment contained in the third paragraph of Article 87.

184 It should also be noted that the first paragraph of Article 87 prohibits the imposition upon prisoners of war of any punishment not imposed upon members of the armed forces of the Detaining Power who have committed the same act. Most armed forces permit their military prisoners to send and receive mail.

185 Presumably, the language of the Power of Origin will be the "native language" of the prisoner of war. However, this it not always true; and the privilege of using a different language will sometimes be sought because of unusual circumstances such as, for example, the fact that the prisoner of war was serving in the armed forces of a country other than his own (*see* note 204 *infra*), or the fact that the parents of the prisoner of war did not accompany him when he immigrated, or that while they have immigrated to the Power of Origin of their prisoner-of-war son, they are still not literate in the language of their adopted land.

186 This is the position taken by the ICRC which does not appear to accept the possibility of an alternative interpretation. Pictet, *Commentary* 350.

187 Tchirkovitch, Nouvelles conventions 105.

censorship purposes practically no personnel familiar with a particular language which is in limited use, neverthless, the result can obviously be morale-shattering to the prisoners of war affected by such a ruling. It is to be regretted that despite the known existence of this problem under the provisions of the 1929 Convention, no effort was made to solve it in the 1949 Convention, which is identical except for minor drafting changes.[188]

It will have become obvious that differences in language, with the consequent difficulties encountered in censoring, constitute one of the major problems with respect to prisoner-of-war correspondence. As a further limitation on the Detaining Power in this area, the first paragraph of Article 76 requires that censorship be accomplished as rapidly as possible,[189] be done only by the dispatching and the receiving States,[190] and only once by each.

As one means of solving the problem of censorship of prisoner-of-war mail during World War II, the belligerents. as we have seen, found it necessary to place a numerical ceiling on the number of items a prisoner of war would be permitted to dispatch each month, a ceiling which has been included as a floor in the 1949 Convention. A number of belligerents in World War II went a step further and only permitted the use of letter forms with a limited number of words, or even with stereotyped messages.[191] This procedure is indirectly prohibited by the first paragraph of Article 71, which requires that the cards and letters furnished to prisoners of war for their use conform "as closely as possible" to the forms annexed to the Convention.[192] These forms provide a blank space for the message and carry the remark that the space "can contain about 250 words which the prisoner is free to write."[193]

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[188] It should be noted that the German military authorities did attempt to solve this problem by issuing an order under which letters written in a number of languages little known in Germany (Urdu, Kurdish, Georgian, etc.) could be sent to Berlin for censoring. *German Regulations*, No. 25, para. 341. At the 1949 Diplomatic Conference the Indian delegation did make a proposal in this connection but it was not pressed. 2A *Final Record* 288.

[189] Obviously, this is a provision which lends itself to subjective interpretation.

[190] This would appear to be intended to preclude censorship by another belligerent should the prisoner-of-war mail pass through its territory while en route to its ultimate destination.

[191] 1 ICRC *Report* 348.

[192] *See* Annexes IVC 1 and 2, respectively.

[193] In the discussion of this matter in Pictet, *Commentary* 346, the statement is made, with respect to the model cards and letters, that it is "to be hoped that the Detaining Powers will adopt them, as recommended by the present provision." This is one of the few instances in which the present author's interpretation of a provision of the 1949 Convention is more liberal than that of the ICRC. "[C]onforming as closely as possible to the models annexed to the present Convention," the language of the first paragraph of Article 71, does not appear to be a simple recommendation. It is a requirement which can only be the subject of variation if the

Several other aspects of the prisoner-of-war mail problem are deserving of mention. Thus, prisoner-of-war mail has long been exempt from postage requirements and continues so to be.[194] This provision for the postage-free carriage of prisoner-of-war mail applies not only to the country where the mail originates (the Detaining Power) and for which it is destined (usually, but not necessarily, the Power of Origin), but also to all intermediate countries (which may be belligerents or neutrals).[195]

Second, in respect of the anguish caused by lack of news, the provisions of the 1949 Convention amplify the cognate provisions of the 1929 Convention concerning the use of telegrams.[196] The second paragraph of Article 71 specifies that prisoners of war (a) "who have been without news for a long period";[197] or (b) who are unable to receive or send news by ordinary postal routes; or (c) who are at a great distance from their homes, may send telegrams, the cost thereof to be met by the prisoner of war concerned either by payment in cash

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Detaining Power is able to show good cause for its action. Both the language and the intent of this provision differ markedly from the "similar, if possible," phraseology of Article 70. (*See* note 175 *supra.*)

[194] The first paragraph of Article 16, 1907 *Hague Regulations;* the first paragraph of Article 38, 1929 *Geneva Convention;* the second paragraph of Article 74, 1949 *Geneva Convention.* The current provision on free postage is implemented by Article 16(1) of the *Rules applicable in common throughout the international postal service,* Part I of the 1974 *Universal Postal Convention.*

[195] In view of the free-postage provision of Article 16(1) of the *Rules applicable throughout the international postal service* attached to the 1974 *Universal Postal Convention,* it appears that States which are Parties to that Convention, but not to the 1949 *Geneva Convention,* would still have a treaty obligation to permit the free passage of prisoner-of-war mail from, through, or to, their national territory. Moreover, the provisions of the *Universal Postal Convention Common Rules* are specifically extended to include prisoners of war interned in a neutral country.

[196] *International Telecommunications Convention* and Article 4 of the *Annex* to the *Telegraph Regulations* are concerned with prisoner of war telegrams. Para. 4 of Recommendation F.1 of the *International Telegraph and Telephone Consultative Committee Greenbook* provides for a 75 percent reduction in the charge to prisoners of war for telegraphic services. Despite the wide use of wireless telegraphy for the transmission of messages prior to the 1949 Diplomatic Conference, the word "telegrams" was retained in the Convention. It is assumed that, nevertheless, if wireless telegraphy facilities are available, the Detaining Power will permit their use, under appropriate safeguards, in meeting its obligations under the second paragraph of Article 71. It has even been suggested that when neutral representatives are permanently stationed in a prisoner-of-war camp, they might be delegated the function of transmitting these messages (perhaps with their own transmitting set). Feilchenfeld, *Prisoners of War* 32.

[197] There is no attempt to define the term "a long period." During World War II three months was usually the period required. Hoole, *And Still We Conquer* 51. Another method made available for the use of those without news for three months was the so-called "Express Messages," really a short airmail message sent via the Central Agency. 2 ICRC *Report* 62–63; *POW Circular No. 1,* para. 145.

or by being charged to his prisoner-of-war account.[198] Because this cost was often found to be beyond the resources of prisoners of war during World War II, the 1949 Diplomatic Conference adopted a Resolution in which it requested the ICRC to prepare a series of specimen messages covering certain appropriate subjects ("personal health, health of relatives at home, schooling, finance, etc.").[199] The ICRC has complied with the operative provision of the Resolution, a report with respect thereto having been submitted to the 1969 International Conference of the Red Cross.[200] A series of specimen messages is therefore available to any Detaining Powers which may agree to permit their use by prisoners of war. Furthermore, the concluding paragraph of Article 74 calls upon all Parties to the Convention to reduce the charge for telegrams sent by or to prisoners of war.

Third, while a prisoner of war is denied his freedom for military reasons, it is not a dishonorable state and there is no military need to deny him the opportunity to transmit to his family documents, such as wills, powers of attorney, etc., of which they may have need.[201] This was allowed during World War II,[202] and the first paragraph of Article 77 of the 1949 Convention continues the practice in somewhat more specific language than was contained in the first paragraph of Article 41 of the 1929 Convention.[203]

Fourth, while there is a tendency to consider the problem of prisoner-of-war mail as one involving solely the transmittal of mail both ways between the prisoner-of-war camp and the territory of the Power of Origin, this is not necessarily so. For example, the family of the prisoner of war with whom he wishes to correspond may live in a third country;[204] or he may have close relatives in another prisoner-of-war

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198 There is a further provision in the second paragraph of Article 71 making the use of telegrams available "in cases of urgency." This was likewise the practice of some belligerents during World War II. *Ibid.*, para. 142.

199 Resolution 9, 1 *Final Record* 362.

200 ICRC, Proposed System of Standard Telegram Messages to and from Prisoners of War.

201 The third paragraph of Article 14 guarantees the retention of "full civil capacity." *See* the discussion of this subject at pp. 180–187 *infra*.

202 *See* 2 ICRC *Report* 75–76.

203 The first paragraph of Article 120 contains a special provision for the transmittal of a will to the Protecting Power, with a certified copy going to the Central Agency.

204 There has scarcely been a war fought during this century in which citizens of neutral States did not volunteer for service in the armed forces of at least one of the belligerents. Americans fought in the British and French armed forces during the 1914–17 period of World War I; Swedes fought in the Finnish armed forces during the 1939 Finnish-Russian war; Americans fought in the British and Canadian armed forces during the 1939–41 period of World War II; etc., etc.

camp.[205] If a third country—neutral or belligerent—which is a Party to the Convention is involved, it is obligated to take the steps necessary to effectuate the relevant provisions with respect to prisoner-of-war correspondence discussed above.

There are a number of more general provisions of the Convention dealing with the mail which also require at least a passing mention. Thus, as soon as a belligerent becomes a Detaining Power (by virtue of having taken members of the enemy armed forces into custody as prisoners of war), it has a duty to inform the prisoners of war and their Power of Origin, through the Protecting Power, of the procedures which it has adopted in order to implement the various provisions of the Convention which are concerned with prisoner-of-war mail (Article 69). Sacks containing prison-of-war mail must be securely sealed, labeled as such, and properly addressed (Article 71, fourth paragraph), and they must be shipped by the most expeditious method available to the Detaining Power (Article 71, first paragraph). And in the event that conditions prevent a belligerent from fulfilling its obligations to provide the necessary transport for prisoner-of-war mail, provision is made for this function to be performed by a neutral agency such as the Protecting Power, the ICRC, or some other organization approved by the belligerents (Article 75).

The many individuals who participated in the drafting of what eventually became the 1949 Convention were well advised to give the amount of attention which they did to the all-important subject of prisoner-of-war mail. Unfortunately, the policies adopted by the Japanese during World War II, by the North Koreans and the Chinese during the hostilities in Korea, and by the North Vietnamese during the hostilities in Vietnam were a far cry from the policies in this regard expressed in the provisions of the 1929 and 1949 Conventions. And when belligerents use this significant prisoner-of-war right to send and receive mail as a means of propaganda, as a means of coercing prisoners of war—as occurred in the latter two conflicts—much of the fabric of the Convention disintegrates.

8. Official Information concerning Prisoners of War

We have seen some of the efforts which were expended in order to ensure that the prisoner of war would be able to advise the members of his family of the fact of his capture, to keep them informed of his condition, and to receive news of them. But the efforts in this direction did not stop there. Based upon experiences of history, a number of other institutions were included among the provisions of the 1949 Convention and a number of other obligations were imposed upon Parties to an international armed conflict.

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[205] This apparently occurred frequently enough during World War II to cause the German military authorities to issue a regulation specifically authorizing correspondence in such cases. *German Regulations*, No. 5, para. 10.

Article 14 of the 1899 Hague Regulations had provided for the establishment of a Bureau of Information relative to prisoners of war in each of the belligerent States (and in any neutral State in the territory of which there were members of the armed forces of a belligerent). Each such Bureau was intended to provide what would now be called a "central data bank" for all information concerning prisoners of war held by that Detaining Power, so that any inquiry concerning an individual prisoner of war could be quickly answered. Such Bureaux were established during the Russo-Japanese War (1904–05).[206] Also, during that conflict, France, the Protecting Power for Russia, requested the Japanese Government to provide it, on a regular basis, with lists of Russian prisoners of war. This was done on a reciprocity basis so that, for the first time, official lists of prisoners of war were exchanged by the opposing belligerents through the medium of the Protecting Power.[207] Then, during the Balkan War (1912–13) the ICRC tried out the idea, which was really only fully implemented during World War I, of a central bureau in neutral territory which would receive and disseminate information on prisoners of war from all belligerents.[208] This bureau was subsequently institutionalized in Article 79 of the 1929 Convention and then in Article 123 of the 1949 Convention.

Thus, through a process of evolution, there had come into being a "Central Prisoners of War Information Agency";[209] national "Prisoners of War Information Bureaux";[210] and an obligation on each belligerent to furnish its adversary promptly with certain specified detailed information concerning every prisoner of war taken into custody by it. With some exceptions,[211] these institutions had functioned fairly successfully during World War II, with the result that the changes made with respect to them in the 1949 Convention were minimal and, for the most part, were concerned with amplification rather than with substance.

Once again national Information Bureaux are to be established in the territory of each belligerent State (and of each neutral or nonbelliger-

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[206] Takahashi, *Russo-Japanese War* 115.

[207] Franklin, *Protection* 77–78. Despite the adoption of this obviously humanitarian device, Article 14 of the 1907 *Hague Regulations* merely added the requirement that the data collected by the national Bureaux would be sent to the Power of Origin "after the conclusion of peace."

[208] Charpentier, 1929 Convention 146; 2 ICRC *Report* 5–6. The latter publication indicates that as early as the Franco-Prussian War (1870–71) the ICRC had opened an unofficial prisoner-of-war information bureau at Basle.

[209] It is generally known simply as the "Central Agency." For a review of the activities of the World War II Central Agency, see 2 ICRC *Report, passim.*

[210] They are generally known simply as "Information Bureaux." The United States has elected to call its Information Bureau the "United States Prisoner of War Information Center" (USPWIC). U.S. Army *Regs.* 633–50, para. 5.

[211] Concerning the Soviet Union's negative attitude in this regard, see ICRC *Report* 253–55.

ent State which is involved with prisoners of war) immediately upon the outbreak of hostilities;[212] and each such State is specifically required to provide its Bureau with adequate space, equipment, and staff.[213] Moreover, it is incumbent upon each State to furnish to its Information Bureau "within the shortest possible period" all of the specified identification material concerning every individual in its custody whose status brings him within one of the various categories listed in Article 4 of the Convention.[214] However, this creates a problem. The first paragraph of Article 17, the 1949 Convention's version of the old "name, rank, and serial number," has added only the date of birth to the information which a prisoner of war is bound to give the Detaining Power.[215] The fourth paragraph of Article 122 requires the Detaining Power, "[s]ubject to the provisions of Article 17," to furnish its Information Bureau not only the foregoing data, but also with the "place . . . of birth, . . . first name of the father and maiden name of the mother, name and address of persons to be informed. . . ." Just how the Detaining Power is to obtain this information is not explained—and certainly no Detaining Power could be held to be in default if a prisoner of war, exercising his rights under the first paragraph of Article 17 refused to furnish these items of personal identification[216] and the Detaining Power was therefore unable to provide all of the information required by the fourth paragraph of Article 122 to its Information Bureau.

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[212] The first paragraph of Article 122, which provides for the establishment of the Information Bureaux upon the outbreak of hostilities, as did Article 77 of the 1929 Convention, now also requires their establishment "in all cases of occupation."

[213] The first paragraph of Article 122 also provides that prisoners of war may be employed in the Bureaux, subject to the provisions regarding the employment of prisoners of war contained in Articles 49–57, inclusive, of the Convention. (*See* note III-55 *infra*).

[214] Article 122, second paragraph. For a discussion of the categories listed in Article 4, *see* pp. 34–84 *supra*.

[215] The Identity Card referred to in Article 4A(4), the model for which is reproduced in Annex IVA of the Convention, includes information as to the place of birth and religion. The Capture Card (Annex IVB to the Convention) and the Correspondence Card and Letter (Annex IVC 1 and 2 to the Convention) also call for identifying information beyond that required to be given by the first paragraph of Article 17.

[216] In its *Information Note No. 4*, at 15, the ICRC stated that while the prisoner of war could refuse to furnish any information beyond that required by the first paragraph of Article 17, "it will be to his advantage to give the officials of the detaining Power who question him all the information provided for in Article 122." (Transl. mine.) Sec. V of the U.S. *Code of Conduct* forbids members of its armed forces to give any information beyond that required by the first paragraph of Article 17. This, like several other provisions of that *Code of Conduct*, is completely unrealistic. Technically, every captured member of the armed forces of the United States will violate this section of the *Code of Conduct* when he completes a Capture Card or writes a Correspondence Card. *See* the preceding note.

With the information now in its possession, the Information Bureau should, in any event, have adequate identification for every prisoner of war. The requirement is then imposed upon the appropriate other agencies of the Detaining Power to furnish to its Information Bureau any and all data with respect to subsequent developments concerning each prisoner of war such as "transfers [between prisoner-of-war camps], releases, repatriations, escapes, admissions to hospital, and deaths";[217] and, with respect to a seriously ill or seriously wounded prisoner of war, the obligation is imposed of furnishing the Information Bureau with information regarding his state of health "regularly, every week if possible."[218]

Having thus accumulated complete and reasonably up-to-date personal information with respect to each and every prisoner of war in the custody of the Detaining Power,[219] the Information Bureau is required, using "the most rapid means" available, to forward this information to the Protecting Power representing the Power of Origin of the prisoner of war and to the Central Agency.[220] It is through this procedure that the basic list of captured personnel should reach the Power of Origin within a comparatively short period of time. It is the compilation made from these lists that establishes the overall accountability of the Detaining Power for enemy personnel at one point in time admittedly in its custody.[221]

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[217] Article 122, fifth paragraph.

[218] Article 122, sixth paragraph. The Finnish representative at the 1949 Diplomatic Conference suggested the deletion of the clause "every week if possible" as being too burdensome a requirement. His suggestion was rejected. 2A *Final Record* 378.

[219] The records containing this information with respect to each prisoner of war must be maintained even for prisoners of war who have died in that status as, under the seventh paragraph of Article 122, the Information Bureau must be in a position to answer inquiries concerning deceased prisoners of war. *See* Roxburgh, *The Prisoner of War Information Bureau* 25.

[220] Article 122, third paragraph. The next paragraph of Article 122 states that the receipt of the information by the Information Bureau "shall make it possible to advise the next of kin concerned"; and the seventh paragraph of Article 122 makes the Information Bureau responsible for answering inquiries concerning prisoners of war. However, these provisions do not mean that anyone may send an inquiry to, and expect an answer from, the Information Bureau. While the *Final Record* is silent on the question, it appears that the Information Bureau will probably transmit information to, and answer inquiries from, official sources (the Protecting Power and the Central Agency) only. (This refers to inquiries concerning enemy prisoners of war. Of course, there is nothing to prevent a belligerent Power from using its Information Bureau as the center of information concerning its own personnel in enemy hands and, if it does so, the answering of inquiries concerning them would be subject to any ground rules that the Power desired to impose.)

[221] The Communist countries have, when the occasion arose, uniformly refused to implement this provision. Concerning the Soviet failure in this regard during World War II, see note 211 *supra*; concerning the North Korean and Chinese failure in this regard during the Korean hostilities, see Hermes, *Truce Tent* 14–141;

The Information Bureau has one other function in addition to that of being a central data bank of prisoner-of-war personal information —it is the agency given the responsibility by the last paragraph of Article 122 for collecting and forwarding the "personal valuables"[222] of prisoners of war who are no longer in the custody of the Detaining Power.[223] The disposition of personal effects other than valuables is subject to arrangements to be agreed upon by the Detaining Power and the Power of Origin.[224]

A Central Prisoners of War Information Agency (Central Agency) is to be established on neutral territory.[225] The ICRC has defined the basic duties of the Central Agency as follows:

> (1) To centralize all information on PW . . . (announcement of capture, deaths, transfers, etc.)
>
> (2) To act as intermediary between the belligerent Powers for the transmission of this information.
>
> (3) To serve as an information bureau and on the basis of the data assembled in its card-indexes or of researches made, to answer enquiries from public or private organizations and private persons.[226]

This statement is somewhat broader than is specified in the second paragraph of Article 123, but there can certainly be no objection to that as long as the added activities are not contrary to the national

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and concerning the Chinese failure in this regard during the Sino-Indian border hostilities (1962) (while insisting that India furnish that very information with respect to civilian internees), see Cohen & Leng, Sino-Indian Dispute 296–97. As the North Vietnamese refused to apply the 1949 Geneva Convention in its entirety (see note I-68 *supra*), they did not furnish lists of prisoners of war as required by Article 122, even though they were furnished lists by the Republic of Vietnam authorities covering all prisoners of war in the custody of that Power, no matter by whom captured. *See, e.g.*, ICRC *Annual Report* 1968, at 30.

[222] "Personal valuables" are specifically stated to include "sums in currency *other than that of the Detaining Power* and documents of importance to the next of kin." (Emphasis added.) *See* note 62 *supra*.

[223] They will have been interned in a neutral country, or repatriated, or released, or have escaped, or died.

[224] *See* the last sentence of Article 122 and note 480 *infra*. *See also* pp. 84–86 *supra*.

[225] Article 123, first paragraph. Since the first such Central Agency was established informally by the ICRC during the Balkan War (1912–13) [or during the Franco-Prussian War (1870–71), note 208 *supra*], such Agency has always been established in Switzerland and pursuant to a proposal advanced by the ICRC.

[226] 2 ICRC *Report* 12. This volume of the ICRC's report on its humanitarian activities during World War II is devoted exclusively to the operations of the Central Agency. Preparations having wisely been commenced long before the actual outbreak of hostilities, the ICRC was able to advise the belligerents on 14 September 1939 that a Central Agency had been established and was in operation in Geneva. (That Central Agency extended its operations beyond those stated in the text, providing information, for example, which permitted the reuniting of dispersed families, tracing lost indivduals, etc.)

interests of a belligerent, which they certainly are not. If, for example, the Central Agency is willing to take upon itself the arduous task of answering inquiries from private organizations and private individuals, this cannot possibly have an adverse effect on a belligerent and it can only make the Central Agency more effective in accomplishing the objective for which it was created: the prompt delivery of complete and correct information concerning all prisoners of war held by all Detaining Powers.

Of course, the Central Agency will, for the most part, be only as effective as the cooperation which it receives from the belligerent Powers allows it to be. While it will have other sources of information to supplement that received from the Detaining Powers,[227] the great mass of its information must come from them. If they do not supply it to the Central Agency, the latter will not be able to pass it on to the Powers of Origin. If the belligerent Powers do not provide it with the facilities to transmit the information which it has received, that information will be of little value. As has been noted immediately above, the third paragraph of Article 122 requires the national Information Bureaux to furnish the required information to the Central Agency and to do this without delay and by the most rapid means available. The second paragraph of Article 123 makes it the responsibility of the Central Agency to collect this information, and that obtained through private channels, and to transmit it to the Power of Origin as rapidly as possible; and obligates the belligerent Powers to assist it in so transmitting the information.[228] Only with this type of all-around cooperation will the letter and the spirit of these provisions of the Convention be fulfilled.[229]

9. Relief Shipments

Few Detaining Powers will be in a position to comply fully with their obligations under the Convention as to food and clothing, particularly if the armed conflict in which they are engaged continues over a considerable period of time. As has been seen, if the civilian population, and perhaps the armed forces, of the Detaining Power

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[227] Of course, it will have one other major source of information—the Capture Cards which the prisoners of war are entitled to send directly to the Central Agency under the provisions of Article 70. *See* note 175 *supra*.

[228] The third paragraph of Article 123 requests all Parties to the Convention, and particularly the belligerent Powers, to provide the Central Agency with financial assistance; and Article 124 gives the Central Agency (and the national Information Bureau) the benefits of the free-postage provision which Article 74 gives to prisoners of war (see notes 194 and 195 *supra*) and either free use of the telegraph facilities or greatly reduced rates (see note 196 *supra*).

[229] Some idea of the vastness of the operations of the Central Agency can be gathered from the fact that by June 1947 the World War II Central Agency had accumulated almost 36 million index cards (as compared to 7 million after World War I). 2 ICRC *Report* 9 & 316.

are on a limited and possibly inadequate food ration, it is highly unlikely that prisoners of war will receive a sufficient ration to keep them in good health and to prevent loss of weight.[230] While there are other possible courses of action which the "law-abiding" Detaining Power can pursue in order to solve the problem,[231] the one which has been employed in past armed conflicts—and which will undoubtedly be employed again in the future—involves relief packages. A discussion of the extent to which the law relating to relief packages has evolved will be helpful in understanding the overall problem.

Article 15 of the 1907 Hague Regulations provided for the distribution of relief to prisoners of war by societies constituted for that purpose. The first paragraph of Article 16 of those Regulations provided for free postage on "parcels by post, intended for prisoners of war." This latter was the only reference in the Regulations with respect to individual relief packages, if such it was. Because of the stabilized fronts which characterized World War I, the belligerents were themselves able to transport and distribute both general relief shipments for prisoners of war and individually addressed parcels.[232] Nevertheless, the two provisions contained in the 1907 Hague Regulations were repeated in almost identical form in the 1929 Convention;[233] but, in addition, Article 37 thereof contained a completely new provision allowing prisoners of war "to receive individually postal parcels containing foodstuffs and other articles intended for consumption or clothing;"[234] and the third paragraph of Article 43 of that Convention charged the prisoners' representatives[235] with the responsibility for "the reception and distribution of collective consignments."[236]

The 1946 Preliminary Conference made a number of suggestions concerning relief supplies: that the principles of both individual and collective relief should be continued; that Detaining Powers should be prohibited from unilaterally forbidding or limiting individual relief parcels; that if any such limitations should be necessary, they should

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[230] *See* p 127 *supra.*

[231] *See* pp. 127–128 *supra.*

[232] *See* 3 ICRC *Report* 5–6. This volume of the ICRC's report on its humanitarian activities during World War II is devoted exclusively to relief activities.

[233] *See* Article 78 and the first paragraph of Article 38, respectively.

[234] (This unofficial English translation of the official French text is taken from 118 *L.N.T.S.* at 371. It is a considerably better translation than the one used officially by the United States, which appears in 47 Stat. at 2043.) More than 44 million individually addressed parcels were sent from Switzerland and through the ICRC during the period 1940–45, inclusive. 3 ICRC *Report* 11.

[235] Concerning the "prisoners' representative," *see* pp. 293–307 *infra.*

[236] During the period 1942–45, inclusive, the ICRC alone handled over 380 million kilograms of collective relief supplies. 3 ICRC *Report* 271. It concluded that collective relief for prisoners of war was much more efficient than individual parcels when large numbers of prisoners of war were involved. *Ibid.*, 202. So did the 1946 Conference of National Red Cross Societies. 1946 Preliminary Conference 85.

be accomplished by special agreements; and that the Power of Origin should be the one to fix the ratio between individual and collective relief supplies.[237] All of these recommendations, except the last, are to be found in the several articles dealing with the subject of relief parcels which were included in the various preliminary drafts of what ultimately became Articles 72–76 of and Annex III to the 1949 Convention.

The first paragraph of Article 72 is the basic provision with respect to relief parcels. It not only includes the general requirement that the Detaining Power shall permit prisoners of war to receive relief parcels, but also imposes a number of specific requirements on the Detaining Power: that the relief parcels may be received "by post or by any other means"; that such relief may be individual or collective; and that, in addition to the food and clothing referred to in prior international agreements, such relief may include four other general categories of supplies (medical, religious, educational, and recreational), of which a number of specific examples are listed.[238] On the other hand, the last paragraph of Article 72 imposes two limitations on the contents of relief parcels: books may not be included in the same parcel with food or clothing; and medical supplies should normally be included in collective, rather than individual, relief parcels.[239]

As was noted in the discussion of the problem of food, the second paragraph of Article 72 specifically prohibits the Detaining Power from considering relief shipments, individual or collective, as in any way relieving it of the obligation to provide the prisoners of war with the ration provided for in the first paragraph of Article 26.[240] While this prohibition applies to all of the supply obligations imposed upon the Detaining Power by the Convention, it is probably only with respect to food, clothing, and medical supplies that the problem will arise; and it is with respect to these three areas that many Detaining

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[237] *Ibid.*, 83–84.

[238] The term "medical supplies" was apparently considered, like foodstuffs and clothing, to be sufficiently all-embracing not to require elaboration (unless "scientific equipment" could be included here as well as under "articles of an educational character"); the term "religious character" would include specifically books and devotional articles; the term "educational character" would include specifically books, scientific equipment, examination papers, and miscellaneous materials; and the term "recreational character" would include specifically books, musical instruments, and sports outfits. (It must not be assumed that every item which falls within these categories must and will be permitted entry and distribution by the Detaining Power. For a list of items which were excluded during World War II and which undoubtedly will, at least for the most part, always be denied to prisoners of war, see 3 ICRC *Report* 12–13.)

[239] The latter limitation was presumably imposed as a result of the experiences of World War II. *Ibid.*, 13–14.

[240] *See* note 107 *supra*. Concerning the same limitation with respect to clothing, see note 117 *supra*.

Powers can be expected to disregard the mandate of the second paragraph of Article 72, particularly where, as a result of individual and collective relief parcels, the prisoners of war are better off, or, at least as well off, as the members of the civilian population of the Detaining Power and, perhaps, as the members of its armed forces.

As in the case of correspondence, provision was made for the contingency that limitations might have to be imposed on the shipment of relief parcels in the interest of the prisoners of war themselves because of the possible inability of systems of transportation available to the belligerents to handle the tremendous weight and bulk which relief parcels might well engender.[241] The third paragraph of Article 72 provides that such limitations may be instituted only on the proposal of the Protecting Power, although the ICRC or any other humanitarian organization engaged in relief activities, may, of course, place limitations on its own shipments if, for example, it is confronted with transportation problems.[242]

Relief shipments, like correspondence, are entitled to move postage-free.[243] They are also exempt from "import, customs and other duties."[244] The third paragraph of Article 74 is a somewhat strange provision in that it states that if a relief shipment cannot be sent by parcel post because of its weight or for any other cause, the Detaining Power shall bear the cost of substitute transportation in any territories under its control and other Parties to the Convention (whether or not belligerents) shall bear the cost in their territories.[245] It would have been more helpful overall if the Convention had specified maximum weights and dimensions for relief parcels sent by mail. This was the procedure followed during World War II, but since it was not prescribed by the 1929 Convention, each Detaining Power set its own

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[241] *See* p. 147 *supra.*

[242] It will be recalled that the first paragraph of Article 71 has a provision concerning possible limitation on mail *to* the prisoners of war, if such limitations are deemed necessary. *See* note 180 *supra.* It would appear that this possibility is even more cogent in the case of parcels.

[243] *See* the second paragraph of Article 74 of the 1949 Convention and Article 16(1) of the *Rules applicable in common throughout the international postal service* attached to the 1974 *Universal Postal Convention.*

[244] Article 74, first paragraph. In June 1942 the United States Congress adopted a joint resolution exempting from duties and customs charges all articles addressed to prisoners of war (56 Stat. 461, 462).

[245] States not parties to the 1949 Convention would have a similar obligation under Article 16(1) of the *Common Rules* attached to the 1974 *Universal Postal Convention.* In any event, the penultimate paragraph of Article 74 provides that costs not covered by the exemptions contained in the third paragraph of Article 74 shall be charged to the sender.

weight limit.[246] Of course, it may be argued that a unilateral action of this nature is now proscribed by the provision in the third paragraph of Article 72 to the effect that "[t]he only limits which may be placed on these shipments shall be those proposed by the Protecting Power."

Once again, as in the case of letter mail,[247] the first paragraph of Article 75 provides for the emergency transportation of relief parcels by the Protecting Power, the ICRC, or some other organization approved by the belligerents, when condition prevent a belligerent from fulfilling its obligation in this respect.[248] If a belligerent prefers to make some arrangement other than the foregoing, it may do so;[249] and barring agreement on another method of payment for the costs of the emergency transportation, the responsibility for such costs is placed proportionately on the Parties concerned.[250]

Another novel provision, and one which was also conceived because of occurrences during World War II, is contained in the second paragraph of Article 76. It prohibits the Detaining Power from the predelivery inspection of individual relief parcels under conditions that will expose the contents of the parcels to deterioration (such as the inspection outdoors, in rain, of packages containing food or books); and which requires that such inspection be conducted in the presence of the prisoner of war to whom the parcel was sent, or his designee.[251] And just as in the case of correspondence, the Detaining Power is directed not to delay the delivery of individual or collective relief parcels because of censorship problems.

During World War II relief shipments of food, clothing, and medical supplies made the difference between survival or nonsurvival to literally tens of thousands of prisoners of war.[252] There is no reason to doubt, and every reason to believe, that the same will be true in any

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[246] 3 ICRC *Report* 12. Eventually most of the Detaining Powers settled on a 5-kilogram (11-pound) maximum. *Ibid.* Article 16(4) of the *Common Rules* attached to the 1974 *Universal Postal Convention* provides that free postage for prisoner-of-war parcels is limited to 5 kilograms but with a 10-kilogram allowance when the contents cannot be split up or when the parcel is sent to the prisoners' representative for distribution.

[247] *See* p. 153 *supra.*

[248] For one ICRC effort to obtain trucks and perform this service during World War II, see 3 ICRC *Report* 186–89. *See also* Feilchenfeld, *Prisoners of War* 37; and Maughan, *Tobruk* 808.

[249] Article 75, third paragraph.

[250] Article 75, fourth paragraph.

[251] Inspections of written or printed matter are specifically excepted from this latter requirement because it was feared that the presence of the prisoner of war might create difficulties which would react against him. 2A *Final Record* 370.

[252] American Prisoners of War 72, 81.

future international armed conflict which continues for a considerable period of time.[253]

10. Internal Discipline[254]

a. THE CAMP COMMANDER

Article 39 provides that the prisoner-of-war camp shall be "under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power." The importance of the selection of the proper individual for this position cannot be overemphasized.[255] Unfortunately, just as bullies and sadists all too frequently find their way into the civilian prison administration system sometimes as wardens, so they also often gravitate into the prisoner-of-war camp administration system, some becoming camp commanders.

Article 18 of the 1929 Convention had specified merely that a prisoner-of-war camp should be commanded by a "responsible officer." During World War II noncommissioned officers were sometimes designated by Detaining Powers as camp commanders.[256] It would appear that a good noncommissioned officer would make a better camp commander than a poor commissioned officer. Nevertheless, the 1949 Diplomatic Conference elected to eliminate this as a possibility by specifying that camp commanders must be *commissioned* officers.[257]

The 1947 Conference of Government Experts recommended that the basic provisions of Article 18 of the 1929 Convention be altered to provide that the camp commander must also be "an officer of the armed forces of the DP [Detaining Power]."[258] The draft convention sub-

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[253] Two important facets of the problem of relief shipments are discussed elsewhere: the part played by the prisoners' representatives in the receipt and distribution of collective relief shipments (pp. 305–306 *infra*); and the agreements which the opposing belligerents may enter into with respect to relief shipments (pp. 84–86 *supra*.)

[254] This section is not concerned with the imposition of disciplinary and penal sanctions on prisoners of war for penal offenses, a subject which is discussed at length in Chapter V. It is concerned with the responsibilities of the camp commander, regulations applicable to prisoners of war, military courtesies, rank, etc.

[255] One commentator has stated that "the attitude and tone of a camp for prisoners [of war] is often controlled by the attitude and the personality of its commandant." Grady, *Evolution* 102. The camp commander also commands all attached labor detachments. *See* p. 245 *infra*.

[256] 1 ICRC *Report* 250.

[257] 2A *Final Record* 264. Apparently the practice of naming noncommissioned officers as camp commanders was almost entirely limited to the Japanese.

[258] 1947 GE Report 161. This was stated to be to prevent "the recurrence of certain unpleasant incidents." We are not enlightened as to what these "unpleasant incidents" were, or how selecting the camp commander from the armed forces would prevent their recurrence. (The ICRC *Report*, note 256 *supra*, refers to occasions "when the camp commandant was not a national of the Detaining Power." This could conceivably have been the situation which gave rise to the "unpleasant incidents.")

mitted by the ICRC to the Stockholm Conference went a step further, requiring the camp commander to belong to "the *regular* armed forces of the Detaining Power,"[259] and this requirement remained unchanged at Stockholm and was ultimately approved at Geneva. On the occasion of the only extensive debate on this Article none of the delegates at Geneva thought it necessary even to mention this change, so it is not possible to determine the problem which was thought to require solution. Moreover, as has already been stated in the discussion of Article 4, for the purposes of the Convention all full-fledged members of the armed forces of a belligerent, no matter how they became such, are members of its "regular armed forces."[260]

The camp commander is responsible, "under the direction of his government," for the application of the Convention in the prisoner-of-war camp. This addition to the cognate provision of the 1929 Convention was added at Stockholm.[261] It was objected to by the ICRC, which considered it to be "imprecise, and also superfluous" and recommended its deletion.[262] This recommendation was supported by several delegations at Geneva[263] but was ultimately rejected by Committee II (Prisoners of War),[264] and the added clause remains. While it undoubtedly is superfluous, as a military commander performs *all* of his functions under the direction of his government, no harm can be perceived from its having been included. Both the individual[265] and the government[266] remain fully responsible for any violations of the Convention occurring in the prisoner-of-war camp.[267]

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[259] *Draft Revised Conventions* 76. (Emphasis added.)

[260] *See* note I-138 *supra*. One explanation for the use of the term "commissioned officer belonging to the *regular* armed forces of the Detaining Power" here is that it was desired to prohibit a Detaining Power from designating as camp commanders commissioned officers of nonmilitary organizations such as the German S.S. and Gestapo, as was done during World War II. *British Manual* para. 159 n.1.

[261] Revised Draft Conventions 66.

[262] Remarks and Proposals 48.

[263] 2A *Final Record* 264 & 401. The Coordination Committee took the same position. 2B *Final Record* 149.

[264] 2A *Final Record* 401–02. The proposal to delete it had previously been rejected by the Second Committee's Drafting Committee. *Ibid.*, 348.

[265] The fear was expressed that the camp commander might be able to use this provision as a means of evading personal responsibility for unlawful acts committed by him against prisoners of war. *Ibid.*, 401. The principle denying "superior orders" as a defense to a war crime is now too well established to cause such concern. *I.M.T.* 466; Nürnberg Principles, Principle IV, at 375; 1951 *Draft Code of Offences*, Article 4. Article 77 of the 1973 Draft Additional Protocol dealt with the subject of superior orders. It was not included in the 1977 Protocol I.

[266] *See* Article 12, first paragraph.

[267] When confronted with the problem of putting down the uprising that had occurred in the United Nations Command prisoner-of-war camp on Koje-do Island, Korea, in May 1952, General Boatner immediately requested "the assignment of a judge advocate [military lawyer] who was thoroughly familiar with

b. KNOWLEDGE OF AND AVAILABILITY OF THE CONVENTION

The very important Convention provisions respecting the requirement for the dissemination of, and instruction in, the contents of the Convention are discussed elsewhere.[268] Compliance with the related provisions with respect to the camp commander and his personnel are at least of equal importance.

The second paragraph of Article 127 provides that any military "or other authorities"[269] who are assigned prisoner-of-war responsibilities "must possess the text of the Convention and be specially instructed as to its provisions."[270] The first paragraph of Article 39 repeats this requirement specifically as to the camp commander, providing as it does that he must have a copy of the Convention in his possession. Moreover, the latter Article places upon him the responsibility for the implementation of the requirement therein contained, that the provisions of the Convention be known to both his staff and to the members of the camp guard. Obviously, there can be no more important requirement than that the individuals responsible for the direct daily supervision of the activities of prisoners of war be fully instructed concerning the rights and obligations both of the prisoners of war and of the representatives of the Detaining Power. Absent that instruction and the knowledge resulting therefrom, the Convention serves no useful purpose except to lay down rules the violation of which will, in some cases, eventually result in the punishment of the violators. Certainly, the objective of the Convention is to procure humanitarian treatment for prisoners of war, not to serve solely as a vehicle for the punishment of uninformed guards for their perhaps unwitting violations of its provisions.

If there is to be some assurance that prisoners of war will receive the humanitarian treatment which was contemplated by the 1949 Diplomatic Conference and to which they are entitled under the provisions of the Convention, obviously they, too, must be fully informed as to just what that treatment is. Presumably, they will have received instruction in this regard during their training by the armed force

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the Geneva Conventions." Boatner, Lessons 35. Concerning this incident, which has many instructive features, see Hermes, *Truce Tent* 233–62; Vetter, *Mutiny, passim;* Harvey, Control, *passim.*

[268] *See* pp. 93–96 *supra.*

[269] While a civilian could not legally be designated as a camp commander (*see* pp. 163–164 *supra*), there is no prohibition against the use of civilian guards who might be used either in prisoner-of-war camps, or more probably, for labor detachments. *See* pp. 246–247 *infra.*

[270] The Convention limits the applicability of this provision to "in time of war." It surely was not intended that the provision would be inapplicable in the event of the "any other armed conflict" of the first paragraph of Article 2.

to which they belong.[271] However, that instruction may have occurred at some considerable time in the past and the prisoners of war cannot be expected to have remained fully aware of the countless details of the many provisions of the Convention. The last paragraph of Article 41 provides, therefore, that the text of the entire Convention, including its annexes and any special agreements entered into between the Detaining Power and the Power of Origin, shall be posted in every prisoner-of-war camp in places where they will be available to be read by any prisoner of war.[272] In addition, a copy must be supplied to any prisoner of war who requests it and who is, for some reason, unable to gain access to the posted copy (individuals who are ill and confined to bed or quarters, individuals in disciplinary or penal confinement, individuals on location in labor detachments removed from the camp, etc.).[273]

There was a substantially similar provision in Article 84 of the 1929 Convention.[274] Its value was demonstrated during the course of World War II. One American author, writing during the course of that armed conflict, said that "the most assiduous group of legal scholars in this country today are our Italian and German prisoners of war."[275] In Korea it was only after a board of officers was appointed in February 1951 to investigate prisoner-of-war matters generally, and it had so recommended, that copies of the 1949 Convention were reproduced in Korean and posted in the United Nations Command

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[271] *See* pp. 93–96 *supra.*

[272] The posted copies must, moreover, be in the language of the particular prisoners of war.

[273] It is undoubtedly with all of the foregoing in mind that the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a somewhat similar provision for the treatment of prisoners serving sentences for having committed a crime. *See* Article 35, Standard Minimum Rules. Even though a set of Rules was approved by the League of Nations as far back as 1934 (*See* League of Nations, *Official Journal*, Special Supplement No. 123, VI.4, at 17 (1934)), we shall have occasion to note many resemblances between the 1949 Convention and the present Rules.

[274] One author who was particularly concerned with German practices in this regard during World War II wrote that certain Detaining Powers, including Germany, "had deliberately prevented prisoners of war from becoming familiar with the text [of the 1929 Convention]. For the future, the new Conventions have remedied this lacuna." Tchirkovitch, Nouvelles conventions 106 (trans. mine). There was no such lacuna; and it is being overly optimistic to state with such assurance that the 1949 Convention has "remedied" the situation.

[275] Brabner-Smith, Legal Aspects 44. He gives examples of several objections made by the prisoners of war to various types of work assignments based upon the wording of the 1929 Convention (picking cotton was alleged to have a "direct relation with war operations" because cotton is used in gunpowder; lumbering was alleged to be "unhealthful or dangerous work.") To the same effect, see Rich, Brief History 427.

prisoner-of-war camp.[276] In Vietnam, the government of the Republic of Vietnam did not permit the posting of the Convention because it did not believe that all of the provisions of the Convention were applicable.[277]

c. REGULATIONS

Every Detaining Power will have a number of different categories of regulations (and orders) that are applicable to prisoners of war. There will be the relevent regulations in force for its own armed forces;[278] general regulations applicable only to prisoners of war;[279] regulations peculiar to a particular prisoner-of-war camp, etc.[280] The available to the Detaining Power (Article 71, first paragraph). And second paragraph of Article 41 provides that all such regulations, orders, etc., must, like the Convention itself, be posted and in a language which the prisoners of war understand;[281] and all orders given orally to individual prisoners of war must likewise be in a language which they understand.[282] These provisions of the Convention are clear and unambiguous and, while compliance with them may cause some problems for the Detaining Power, they will obviously be of great value to the prisoner of war.

d. RANK

Even Article 16, providing for the equal treatment of all prisoners

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[276] Meyers & Bradbury, Political Behavior 240. The Convention was not legally in effect during that conflict (see note I-114 *supra*). The Republic of Korea had agreed to be bound only by Article 3 (1 ICRC, *Conflit de Corée* 12–13) and the United States had agreed to be only "guided by the humanitarian principles" of the Convention, particularly Article 3. *Ibid.*, 13. The Convention was never posted in North Korea.

[277] *Vietnam, Article-by-Article Review*, Article 41. Of course, in both Korea and Vietnam any compliance whatsoever by the Republic of Korea or the Republic of Vietnam represented a more humanitarian approach to the treatment of prisoners of war than the complete noncompliance by the other side. Strangely, the *Review* itself did not indicate any specific provisions of the Convention which the Republic of Vietnam considered to be inapplicable.

[278] Article 82, first paragraph, makes prisoners of war subject to these regulations. *See* pp. 318–319 *infra*.

[279] Article 82, second paragraph, envisages such regulations. *See* pp. 320–321 *infra*.

[280] Daily schedules, work assignments, class schedules, sports events, etc.

[281] It will have been noted that while the first paragraph of Article 41 says "in the prisoners' own language," the next paragraph says "in a language which they understand." It is probable that this was merely an oversight of the Drafting Committee. The difference in wording actually originated in the draft prepared by the ICRC for the Stockholm Conference (*Draft Revised Conventions* 76–77) and was never changed.

[282] This will sometimes create major difficulties for a Detaining Power short of personnel who speak the language of the prisoners of war; but it is a great deal more logical than the giving of an order of which the prisoner of war does not understand a single word and then permitting his punishment for his failure to comply, a procedure frequently followed during World War II.

of war "without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar critaria," makes an exception with respect to rank.[283]

Because of the difficulty frequently encountered in attempting to equate the ranks in various armed forces, the first paragraph of Article 43 calls upon the opposing belligerents to communicate to each other immediately upon the outbreak of hostilities "the titles and ranks of all the persons mentioned in Article 4"; as well as to communicate information from time to time concerning titles and ranks subsequently created. Most of the belligerents exchanged the required information during World War II,[284] but they often found it difficult to equate the ranks involved.[285] Even where there was no difficulty in equating ranks, problems arose with respect to this matter. Thus, when the Germans ordered members of the French armed forces back into custody in 1941, many noncommissioed officers at first claimed to be privates because of a rumor that privates would be released first. When they later found that there was no basis for this rumor and claimed their proper grade, the Germans refused to restore it to them;[286] and in the reverse of this situation, the United States found that many German privates had been promoted to noncommissioned grade just before capture in North Africa, presumably in order to remove them from the category of prisoners of war required to perform labor for the Detaining Power;[287] while others claimed to be noncommissioned officers but had no documentary proof of this status.[288] This latter

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[283] And sex. *See* pp. 178–180 *infra.*

[284] 1 ICRC *Report* 283; [1942] 3 For. Rel. U.S. 24–32 (1961). Concerning the exchange of information regarding the ranks of medical personnel, see note IV-121 *infra.*

[285] *German Regulations,* No. 15, para. 117 (British midshipmen, warrant officers, and acting pilot officers); *ibid.,* No. 25, para. 334 (American warrant officers); *ibid.,* No. 29, para. 439 (commissioned officers in the Indian army); *ibid.,* No. 33, para. 514 (noncommissioned officers in the British navy); *ibid.,* No. 46, para. 841 (noncommissioned officers in the Royal Air Force). The United States also had difficulty with the ranks of the members of the German "quasi-military" organizations. Rich, Brief History 515.

[286] *German Regulations,* No. 7, para. 9.

[287] Rich, Brief History 515; Lewis & Mewha 157. The diary of one captured member of the German Afrika Korps reveals that after destroying everything of military value in anticipation of the impending surrender of the German forces in North Africa, he was promoted to NCO rank. Hoole, *And Still We Conquer* 9. Concerning the labor of noncommissioned officers, *see* pp. 221–224 *infra.*

[288] Rich, Brief History 516. Their *soldbuchs* (individual personnel records normally in the possession of each German soldier) had, in many cases, been taken from them for intelligence purposes and had not been returned. Perhaps because of the obvious hardship thus caused to prisoners of war through no fault of their own, U.S. Army *Regs.* 633–50, para. 30b now provides that where an individual has no documentary proof of his rank, he "may submit a request through channels to his government for proof of status."

problem may conceivably have been solved by the provisions of the third paragraph of Article 17 for the issuance of identity cards in duplicate showing, among other items, the rank of the individual, and the provisions of the second paragraph of Article 18 which, in effect, prohibit the taking from the prisoner of war of both copies of the identity card furnished him by his own armed forces and requiring the Detaining Power to provide such a card to any prisoner of war who does not have one.[289]

As a result of the discovery of the mass, last-minute, "precapture promotions" accorded by the German command to many of its private soldiers in North Africa during World War II, and as a method of rectifying the situation with respect to at least a considerable number of these promotions, the United States Army issued a directive denying recognition of any promotion if evidence of it was received after the individual was already in custody.[290] Of course, this prevented recognition of even legitimate postcapture promotions. The second paragraph of Article 43 now provides that the Detaining Power must recognize promotions of which it is notified by the Power of Origin. Presumably, this would include promotions made both before and after the individual becomes a prisoner of war.[291] This appears eminently fair—except that a Power of Origin may now do legally what the German command in Africa attempted to do as a subterfuge during World War II. What will a Detaining Power do if it is officially advised that the Power of Origin has promoted to noncommissioned officer grade all of the members of its armed forces who are being held as prisoners of war? Will it thereafter assign them to supervisory work only as provided by the second paragraph of Article 49—with no one to supervise? This appears extremely unlikely. It would seem that any action of this nature by the Power of Origin would be such a violation of the spirit of the Convention as to warrant the Detaining Power in refusing recognition to the promotions to noncommissioned officer grade so accorded.

There are numerous advantages for the prisoner of war in the recognition by the Detaining Power of the prisoner of war's rank, commissioned or noncommissioned. As we have just seen, noncommissioned officers may be required to perform only supervisory work. Under the last paragraph of Article 49 commissioned officers may volunteer for work but may not be compelled to perform any labor. They

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289 See p. 111–112 *supra*.

290 Rich, Brief History 515.

291 U.S. Army *Regs.* 633–50, para. 31 provides that "[w]hen evidence is received that a PW has been promoted, the promotion will be recognized."

(and prisoners of war of equivalent rank)[292] are entitled to be treated "with the regard due to their rank and age."[293] Special camps for officer prisoners of war are contemplated and enlisted men of the same armed forces are to be assigned as orderlies, which is to be their exclusive work assignment.[294] Moreover, under the last paragraph of Article 44 commissioned officers are to be enabled to supervise their own mess. The first two paragraphs of Article 45 provide similarly that the other prisoners of war shall be treated with due regard for their rank and age and are to be enabled to supervise their messes.

Provisions of the Convention concerning insignia and the military courtesy of the salute are, to the prisoner of war, far more important than they might at first appear.[295] As we have just seen, the first paragraphs of Articles 44 and 45 require the Detaining Power to treat all prisoners of war with due regard for their rank. Article 40 requires the Detaining Power to permit prisoners of war to wear insignia of rank and grade, badges of nationality, and decorations. The fourth paragraph of Article 87 goes a step further, forbidding the Detaining Power to deprive the prisoner of war of his rank or to prevent him from wearing his insignia.[296]

Members of the armed forces of the Detaining Power are not required to salute prisoners of war of superior rank.[297] Ordinary mili-

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[292] This might, for example, be persons who accompany the armed forces pursuant to Article 4A(4) (*see* pp. 60–62 *supra*) if the identification card which the Power of Origin has issued to them specifies an equivalent rank. 2A *Final Record* 268.

[293] The Convention nowhere specifies what this "regard" is.

[294] Article 44, second paragraph. During World War II the United States assigned to officer prisoners of war, in addition to cooks, "one orderly for each general officer, one for each group of three field officers [majors, lieutenant colonels, and colonels], and one for each group of six company officers [lieutenants and captains]." *POW Circular No. 1*, para. 45. (Lewis & Mewha, 159, gives a different ratio and adds that the enlisted men chosen for this duty were those who were incapable of doing a full day of labor.)

[295] The recognition of their importance to morale was early recognized by the Chinese Communists in Korea and the denial of rank was used as a method of destroying prisoner-of-war morale. *See* pp. 172–173 *infra*.

[296] This prohibition is in the context of punishment for a disciplinary or penal offense. It would, *a fortiori*, apply to conduct which, while perhaps objectionable to the camp commander or to a guard, did not attain the status of being judicially punishable.

[297] It might be argued that the provisions of the first paragraph of Article 44 to the effect that prisoner-of-war officers "shall be treated with the regard due to their rank" requires members of the armed forces of the Detaining Power to salute prisoner-of-war officers of superior rank. However, the second paragraph of Article 21 of the 1929 Convention was substantively identical and it was not the practice during World War II, nor did any belligerent claim that it should be. As the matter was not even mentioned at the 1949 Geneva Diplomatic Conference, it must be assumed that there was no intention to change the prior practice. Hitler is quoted as having said that "the most humble German national is

tary courtesy, however, calls for them to return the salute of a prisoner of war.[298] Prisoners of war other than officers must salute all officers of the armed forces of the Detaining Power and must comply with any other requirements for external marks of respect contained in their own military regulations.[299] Officer prisoners of war are required to salute only the camp commander, whatever his rank may be, and officers of the armed forces of the Detaining Power who are their superior in equated rank.[300]

One other problem with respect to saluting arose during World War II—the type of salute to be given. The relevant clause in the second paragraph of Article 18 of the 1929 Convention merely said that "prisoners of war must salute all officers of the Detaining Power."[301] Germany insisted that prisoners of war held by it use "the established military salute of their native country";[302] while some Detaining Powers refused to permit prisoners of war to give the German Nazi and Italian Fascist extended-arm salutes and insisted that these prisoners

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deemed more important than the highest ranking [prisoner of war]." *German Regulations*, No. 14, para. 79. To a certain limited extent this is correct. The private who is a guard in a prisoner-of-war camp need not salute the prisoner-of-war field marshal—but neither need the latter salute the former. *See* text in connection with note 300.

[298] The military salute is a twofold action: it is initiated by the lower in rank and returned by the superior. While the member of the armed forces of the Detaining Power need not initiate the salute even to a prisoner of war of superior rank, he should, as a matter of military courtesy, return it. Rich, Brief History 483.

[299] Article 39, second paragraph. Other external marks of respect would include standing when the officer enters the room, remaining at attention while conversing with the officer, etc. These are not marks of obsequiousness, but of disciplined training. (One report on World War II comments on the high morale of prisoners of war who "showed their hostility toward the Germans by often refusing to salute [and] by failing to come to attention when a German officer entered the barracks." American Prisoners of War 80. Their morale may well have been high, but they would have had no valid complaint had they been punished for their insubordinate violations of the Convention and German regulations.)

[300] Article 39, third paragraph. Article 18, third paragraph, of the 1929 Convention had not included a provision requiring all prisoners of war to salute the camp commander, and this had occasioned a number of disputes when he was of inferior rank or a noncommissioned officer. 1 ICRC *Report* 250. The 1949 Convention provides a sort of compromise by requiring the camp commander to be a commissioned officer (Article 39, first paragraph) and by aberrantly requiring all prisoners of war to salute him even if they are his superior in rank (Article 39, last paragraph).

[301] The clause concerning compliance by prisoners of war with the regulations of their own armed force was so placed in the sentence as probably not to be applicable to the clause concerning the salute. (The ICRC felt otherwise. *Ibid.*)

[302] *German Regulations*, No. 16, para. 140. This position, of course, was consistent with the German argument for permitting the members of its armed forces who became prisoners of war to use the Nazi salute. *See* text in connection with notes 303 and 304.

of war give the form of salute used by the armed forces of the Detaining Power.[303] This was finally resolved by permitting all prisoners of war to use the salute prescribed by the military regulations of the armed forces of which they were members.[304] This problem should not arise again because of the precedent established by the World War II decision, and because there is a more valid basis than there was under the 1929 Convention for arguing that the clause "by the regulations applying in their own forces" contained in the second paragraph of Article 39 of the 1949 Convention applies to the form of the salute as well as to external marks of respect. While, grammatically, the paragraph as redrafted still leaves much to be desired,[305] the members of the national delegations at the 1949 Diplomatic Conference were certainly well aware of the problem and of its World War II solution, and can validly be assumed to have adopted that solution as their own.

While acting as the Detaining Power in North Korea, the Chinese did everything in their power to destroy morale by breaking down the military group structure.[306] Officers were not permitted to wear their insignia of rank; distinctions of rank were prohibited; and any officer, commissioned or noncommissioned, who attempted to give an order was humiliated and punished.[307] The Chinese insisted that members of the armed forces lost their rank when they became prisoners of war—and they frequently and intentionally appointed the more junior prisoners of war as leaders in the prisoner-of-war camps.[308] The Chinese practices were in direct violation of a number of the articles of the Convention.[309] They were also contrary to general military

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[303] 1 ICRC *Report* 250; Rich, Brief History 482.

[304] 1 ICRC *Report* 250. The military authorities in the United States were severely criticized for permitting prisoners of war to use the Nazi salute. Rich, Brief History 482.

[305] The discussion of Article 39 in its origin and at the 1949 Geneva Diplomatic Conference is not helpful.

[306] Schein, Patterns 257.

[307] U.K., *Treatment* 19.

[308] *Ibid.*, 17. It was this practice against which part of Sec. IV of the *Code of Conduct* was directed. Ineptly, it states: "If I am senior, I will take command. If not I will obey the lawful orders of those *appointed over me* and will back them up in every way." (Emphasis added.) Certainly, there was no intention to give a legal status to the type of "appointments" made by the Chinese Communists in Korea—but that would likely be the defense, and an arguable one, made by any American prisoner of war who, after repatriation, was court-martialed for cooperating with the enemy by obeying the orders of a fellow prisoner of war "appointed over him" by the enemy Detaining Power. (While the "Instructional Material" under Sec. IV of the *Code of Conduct* does clarify the matter to some extent, it certainly does not completely clear up the discrepancy.) The North Vietnamese apparently followed the Chinese procedure. Naughton, Motivational Factors 11.

[309] Article 39, last paragraph; 40; 44, first two paragraphs; 45, first paragraph; 79, first two paragraps; and 87, last paragraph, among others.

usage.[310] It was part of a "brainwashing" technique which was only very marginally successful.[311]

11. Miscellaneous Protections

a. COMMON TREATMENT

The preceding subsection opened with a quotation from Article 16 of the Convention[312]—but only to point out that rank was one of the exceptions specified therein. What that Article does is to place upon the Detaining Power the duty to treat all prisoners of war alike, "without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria."

The 1907 Hague Regulations were criticized for not including a prohibition against discrimination in the treatment of prisoners of war.[313] Article 4 of the 1929 Convention remedied this situation to some extent by providing that any difference in treatment accorded various prisoners of war was only lawful when it was based on rank, health, professional qualifications, or sex.[314] However, despite the foregoing, there were extremes of treatment of different nationalities, and even of identifiable groups within nationalities, by the same Detaining Power during World War II.[315] All, or nearly all, of the belligerents made national and political distinctions in asigning prisoners of war to par-

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[310] *See, e.g., British Manual* para. 159 n.2, which states: "By Q.R. 286, when members of the British army become prisoners of war the ordinary relations of superior and subordinate remain unaltered." *See also U.S. v. Floyd;* and *Re Tassoli.*

[311] As yet not enough information is available to determine whether the North Vietnamese failure to follow the Chinese practice was because of its lack of quantitative success, because of the relatively small number of prisoners of war held by them, or because of some other reason.

[312] *See* pp. 167–168 *supra.*

[313] Phillimore & Bellot 60.

[314] Article 1 of the 1929 Wounded-and-Sick Convention specifically required that individuals protected by that Convention be "treated. . .and cared for. . .without distinction of nationality," a provision, which, for some unknown reason, was not repeated in the 1929 Prisoner-of-War Convention drafted at the same time and by the same Conference.

[315] Germany at least generally attempted to apply this provision with respect to British and American prisoners of war, and 99 percent of the American prisoners of war held by Germany survived. The American Red Cross attributed this to reciprocal compliance with the provisions of the 1929 Convention. *New York Times,* 2 June 1945, at 8, col. 6. *See also* note 324 *infra.* Estimates of the mortality among Russian prisoners of war captured by the Germans go as high as 95 percent. Dallin, *German Rule* 414-15; Davidson, *The Trial of the Germans* 32–33. The 1929 Convention was not in effect as between Germany and the Soviet Union. *See* note I-2 *supra.*

ticular camps.[316] There is nothing inherently wrong with this procedure, providing all prisoners of war in all camps receive the same treatment.[317] The objection to it is that, whatever the original motivation for the separation, there will inevitably be a tendency to give better treatment to the more pliant prisoners of war, and less favorable treatment to the more aggressive and antagonistic prisoners of war.

In an effort to remedy this situation, the 1946 Preliminary Conference recommended that the rights of all prisoners of war to like treatment be recognized "without distinction of opinion[,] race, religion, or nationality."[318] This was just a general recommendation, unrelated to any particular article. However, in dealing with proposed revisions of the 1929 Wounded-and-Sick Convention, the Preliminary Conference specifically recommended that the appropriate article be changed to provide for like treatment "without any distinction whatever, particularly of nationality, race, sex, religion or political opinion."[319] This was the source for much of what became Article 16 of the 1949 Prisoner-of-War Convention.[320]

Although the general approach to the problem has been somewhat widened (while the 1929 Prisoner-of-War Convention enumerated only the items which would justify discriminatory treatment, the 1949 Convention enumerates both the items which will justify it *and* the items which may not be a basis for discriminatory treatment), it is doubtful that this has either ensured greater protection for the prisoner of war or imposed any obviously greater restrictions on the actions of the Detaining Power. If the Detaining Power may only lawfully discriminate in its treatment of prisoners of war by reason of rank, health, professional qualifications, or sex (as provided in the 1929 Convention and as more or less repeated in the 1949 Convention), then obviously

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[316] At least six different national and political groupings were established and maintained for the allocation of prisoners of war to permanent prisoner-of-war camps in the United States; (1) German army anti-Nazis; (2) other German army; (3) German navy anti-Nazis; (4) other German navy; (5) Italian; and (6) Japanese. Lewis & Mewha 91 n.44; *see also*, Tollefson, Enemy Prisoners of War 59.

[317] One commentator asserts that the only objective of categorizing by political conviction is inequality of treatment. Flory, Nouvelle conception 66. That this is a possibility cannot be doubted. *See* text in connection with notes 332–334 infra. However, the official ICRC discussion of Article 16 states that "[t]he wording excludes differentiation only when it is of an adverse nature." Pictet, *Commentary* 154. And in Korea the ICRC Delegate specifically recognized the urgent need that in establishing a new camp for officer prisoners of war "the two political categories [Communist and anti-Communist] would be kept apart and every group could have an adequate amount [*sic*] of orderlies recruited among volunteer E.M. [enlisted men] of the same political colour." 2 ICRC, *Conflit de Corée*, No. 341. *See also* the discussion of the third paragraph of Article 22 at pp. 175–178 *infra*.

[318] 1946 Preliminary Conference 68.

[319] *Ibid.*, 19.

[320] *Draft Revised Conventions* 60-61.

it may not lawfully discriminate by reason of race, nationality, religious belief, or political opinions, or any other distinction founded on similar criteria. In other words, while perhaps somewhat more specific, the provisions of Article 16 of the 1949 Convention do not really go beyond those of Article 4 of the 1929 Convention.[321]

Moreover, the third paragraph of Article 22 actually requires the Detaining Power to allocate prisoners of war to its various prisoner-of-war camps on the basis of nationality, language, and customs. The 1907 Hague Regulations had contained no prohibition against the mixing of prisoners of war of different nationalities, races, and colors in a prisoner-of-war camp. It was criticized for thus permitting the bringing together of individuals who could communicate to each other infectious diseases[322] against which the infected individuals would not have a natural immunity. Perhaps as a result of this criticism, when the 1929 Convention was drafted, it contained a provision in its third paragraph of Article 9 prohibiting the Detaining Power, *so far as possible*,[323] from "assembling in a single camp prisoners of different races or nationalities." We have already seen that many nations did segregate by nationality during World War II.[324] They were thus actually complying with the requirements of the 1929 Convention, whatever their motive in so doing may have been.

The portion of the third paragraph of Article 22 discussed above could, under some circumstances, result in an unintended hardship either for the Detaining Power or, of more importance, for the prisoner of war. Some armed forces are composed of individuals of many nationalities, languages, and customs, mirroring the nation of which they are a part. When these individuals become prisoners of war, should the Detaining Power be required to separate them into those constituent categories, perhaps even against their desires? And what of the national of one country who is captured while serving in the armed force of another? Should he be separated from the men with

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[321] Article 6(1) of the Standard Minimum Rules, while obviously deriving from Article 16 of the 1949 Convention, has clearly benefited from the latter's birth pains.

[322] Phillimore & Bellot 56–60.

[323] For example, a Detaining Power might hold a very limited number of prisoners of war of a particular race or nationality. It might then put them in a separate compound which was part of a larger prisoner-of-war camp. This complied with the third paragraph of Article 9 of the 1929 Convention. 1 ICRC *Report* 248.

[324] *See* text in connection with note 316 *supra*. Germany attempted to go a step further and to separate Jewish prisoners of war from the other prisoners of war of the same nationality, with the admonition that "in all other respects" they were to receive treatment identical to that received by their fellow nationals. *German Regulations*, No. 48, para. 876. Sometimes the German camp commander was successful in complying with this mandate (American Prisoners of War 90–91) and sometimes he was unable to overcome the resistance of the non-Jewish prisoners of war of the same nationality (*ibid.*, 75).

whom he has served and, perhaps, with whom he has been captured? The provision approved at Stockholm would probably have mandated such procedure in each of these cases.[325] At the 1949 Diplomatic Conference the United Kingdom representative proposed an amendment which was directed at preventing the separation of an individual from other members of the armed force in which he was serving at the time of his capture.[326] After some colloquy between the representatives of the Soviet Union and the United Kingdom, the proposal which had been made by the latter was adopted by Committee II (Prisoners of War);[327] but at the Plenary Meeting the Soviet proposal, with a British amendment permitting a prisoner of war to be separated from other members of the armed force in which he was serving at the time of capture only if he consented to such separation, was approved.[328] Thus, the individual who is serving in the armed force of an ally of his country at the time of his capture will normally be confined in a prisoner-of-war camp with other members of that armed force. However, if the Detaining Power so desires, *and if the prisoner of war consents,* he may be transferred to confinement with the members of the armed forces of his own country.[329]

What of the situation where an armed force is composed of individuals of many nationalities, languages, and customs? Although the *travaux préparatoires* referred to above indicate that this problem was not mentioned during the discussion and amendment of what is now the third paragraph of Article 22, it is fairly obvious that this was a motivating factor in the position taken by the Soviet representative.[330] The Soviet Union and, hence, the Soviet armed forces, is composed of people of many nationalities, many languages, and many cus-

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[325] Revised Draft Conventions 60.

[326] 2A *Final Record* 347.

[327] *Ibid.*, 353–54. Actually, it is somewhat difficult to discern how the Soviet proposal differed substantively from that of the United Kingdom proposal of that time.

[328] 2B *Final Record* 281.

[329] Thus, in a situation such as that which occurred during World War II, where many Americans had joined the British or Canadian armed forces before the United States became a belligerent, and had elected to continue to serve in the allied armed force after that event, if they were captured they were normally confined with other members of the armed force in which they were serving at the time of capture. *See* note I-299 *supra.* However, with their consent, they could now be confined with other American prisoners of war, *i.e.*, with American nationals who were serving in the United States armed forces at the time of capture.

[330] It is also why he objected to the United Kingdom proposal to add the clause concerning the consent of the prisoner of war—until, probably, the Soviet Delegation concluded that this could be made to serve the Soviet interest. The Soviet representatives were not here concerned with problems which might arise when the Soviet Union was the Detaining Power, but only with those arising when members of their armed forces became prisoners of war. (The foregoing is not intended to have pejorative implications. It is the way every nation negotiates.)

toms. However, as they would all have been serving in the same armed force when captured, they would have a right to be confined together and could only be segregated with their consent. Of course, this does not mean that all of the prisoners of war of one armed force must be assembled in one prisoner-of-war camp. There may, and usually will, be a number of camps and in each camp there may, and usually will, be a number of compounds (or other smaller enclosures). In breaking the mass of prisoners of war down into camps and compounds, the Detaining Power will probably, for its own administrative purposes, put all of the prisoners of war of a particular nationality or language in the same compound or compounds, camp or camps.[331] As the prisoners of war so combined in the compounds or camps would, in each case, as well as overall, all be members of the same armed force, not only is there no prohibition against such procedure, but it is actually contemplated and required by the third paragraph of Article 22.

Although Article 16 and the third paragraph of Article 22 certainly represent one of the basic "humanitarian principles" of the Convention with which the belligerents in Korea agreed to comply,[332] there can be no doubt of its utter disregard by the Chinese Communists during the course of their participation in that armed conflict. For example, despite the prohibition against discrimination based on political opinions, the Chinese Communist treatment of prisoners of war held by them in North Korea was based entirely on a policy of good treatment for the so-called progressives (those prisoners of war who would cooperate with them in the political field) and bad treatment for the so-called reactionaries (those prisoners of war who refused to cooperate with them in the political field).[333] The discrimination based on political opinion included good food for the progressives and poor food for the reactionaries.[334]

While the maintenance of discipline and order in prisoner-of-war camps has frequently been somewhat of a problem, it only reached really serious proportions in Korea where the Communists, North Ko-

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[331] For example, India, and its armed forces, is composed of many nationalities with different languages and different customs—Hindus, Sikhs, Bengalis, Panjabis, etc., etc. If any large number were captured the Detaining Power might, perhaps, try to identify and segregate in separate compounds or camps the members of each of these groups.

[332] *See* note I-114 *supra*. Even though this commitment was made on the Communist side by the North Koreans only, it must be recalled that the People's Republic of China insisted that the million or more fully equipped, trained, and organized Chinese troops in Korea were merely "volunteers" serving in the North Korean army.

[333] U.K., *Treatment* 32. One student of the practices of the People's Republic of China apparently considers it to be almost inconceivable that the PRC would not make that same distinction in any future international armed conflict in which it might be involved. Miller, *The Law of War*, 238 and 243.

[334] *See* text in connection with notes 161 and 162 *supra*.

rean and Chinese, used the prisoner-of-war camps as a second battlefront.[335] The incidents which occurred in the prisoner-of-war camps there[336] demonstrated that where ideology is concerned, and where there is a major schism within the prisoner-of-war group itself, segregation by political opinion may be an absolute requirement in order to ensure the safety of many of the prisoners of war.[337] Once again, it is necessary to state that there is no valid objection to this procedure as long as there is, nevertheless, compliance with the provisions of the third paragraph of Article 22 and as long as there is no discrimination in the treatment received by the individuals confined in different camps or compounds.

b. WOMEN PRISONERS OF WAR

References to sex generally or to women specifically will be found in nine different provisions of the Convention. The provisions referring to women specifically have two basic aims: (1) to guarantee to women prisoners of war treatment as favorable as that accorded to male prisoners of war; and (2) to afford them protection from sexual molestation to the maximum extent possible.[338]

During World War I comparatively few women participated as members of the armed forces in capacities which made becoming a prisoner of war a foreseeable possibility. Accordingly, it is understandable that Article 3 of the 1929 Convention, containing the only reference in that Convention to women, provided merely that they should be treated "with all consideration due to their sex." The situation changed radically during World War II with large numbers of women serving in the armed forces and in the resistance movements of many belligerents and in many capacities, including combat.[339] It is not surprising, therefore, that the 1947 Conference of Government Experts proposed that to the clause quoted above there should be added the provision "and their treatment shall in no case be inferior to that accorded to men."[340] Prior to the 1948 Stockholm Conference the ICRC made some editorial changes (which included making the pro-

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[335] UNC., Communist War, *passim.* The extract of this study which was published in 28 *Dept. State Bull.* 273 covers this subject.

[336] *See* Hermes, *Truce Tent*, ch. XI (pp. 233–62).

[337] *Ibid.*, 260. The United States Army now officially takes the position that under Article 16 prisoners of war may legally be segregated for the purpose of the maintenance of order. *U.S. Manual* para. 92b. Concerning the problem of the maintenance of order generally, see Harvey, Control, *passim.*

[338] Pictet, *Commentary* 146–47. The second paragraph of Article 27 of the Fourth (Civilian) Convention accomplishes this much more succinctly than does the Third (Prisoner-of-War) Convention, specifically providing that "[w]omen shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."

[339] *See, e.g.*, the comment at p. 66 *supra.*

[340] 1947 GE Report 119.

vision affirmative instead of negative),[341] and the provision as so enlarged became the second paragraph of Article 14 of the 1949 Convention. It is the basic provision concerning the rights of women who become prisoners of war. It states that "[w]omen shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men."

Having established that the basic norms for the treatment of women prisoners of war were to be regard for their sex and equality with the treatment received by men prisoners of war, additional provisions for the protection of women prisoners of war were added to the Convention in a number of areas considered to be particularly sensitive.[342] Thus, the fourth paragraph of Article 25 provides that if women are interned in a prisoner-of-war camp with men, they are to be billeted in "separate dormitories";[343] and the second paragraph of Article 29, after providing that toilet facilities ("conveniences") are to be available for the use of prisoners of war day and night,[344] goes on to provide that separate such facilities shall be provided for women prisoners of war.

In the chapter of the Convention dealing with disciplinary and penal sanctions, the draftsmen deemed it appropriate to include four separate provisions with respect to women prisoners of war. Article 88, which is concerned with punishment generally, was amended by the 1949 Diplomatic Conference, upon the recommendation of the British delegation, by the addition of the middle two paragraphs.[345] The second paragraph of Article 88 provides that a woman prisoner of war shall not receive a sentence to punishment which is more severe, nor be treated more severely while undergoing punishment, than a women member of the armed forces of the Detaining Power sentenced for th same offense; and the third paragraph of Article 88 repeats the same prohibitions but with respect to the standards applied to male members of the armed forces of the Detaining Power sentenced for the same offense.

As parallels to the "separate dormitory" provision of the last paragraph of Article 25, the last paragraph of Article 97 provides that

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[341] *Draft Revised Conventions* 60.

[342] One of the French delegates at the 1949 Diplomatic Conference thought that the second paragraph of Article 14 was sufficiently broad to cover all contingencies, but he nevertheless concurred in the repetition which resulted from the subsequent specific provisions. 2A *Final Record* 489.

[343] Article 75(5) of the 1977 Protocol I uses the phrase "held in quarters separated from men's quarters." The Standard Minimum Rules are much more specific in this respect, Article 8(a) thereof providing that "in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate."

[344] *See* note 122 *supra*.

[345] 3 *Final Record*, Annex No. 150; 2A *Final Record* 489–90, 502, & 311.

women prisoners of war undergoing disciplinary punishment "shall be confined in separate quarters from male prisoners of war," and the second paragraph of Article 108 contains the same provision with respect to women prisoners of war undergoing punishment after conviction of a penal offense.[346] Both of these articles provide further that women prisoners of war so confined shall be under the supervision of women.[347]

As has already been mentioned, Article 16 requires that in applying it provisions against discriminatory treatment, the other provisions of the Convention relating to sex should be taken into consideration.[348] Those which have just been discussed can scarcely be said to provide for *preferential* treatment for women. What they actually require is "equal, but separate" treatment. The first paragraph of Article 49, which requires the Detaining Power to take sex into account in the utilization of the labor of prisoners of war, is probably the sole provision to fall within the ambit of the Article 16 exception. Presumably, the Detaining Power could favor women prisoners of war in making work assignments, excluding them from the more arduous tasks, without violating the "no discrimination" provision of Article 16.

All of those who had a hand in the drafting of the 1949 Convention did their utmost to provide the special protection which is unquestionably required for women prisoners of war, both from the representatives of the Detaining Power and from their male fellow prisoners of war. The provisions ultimately incorporated into the Convention appear to be adequate. However, once again, their effectiveness will depend almost entirely on the will of Detaining Powers to see them properly and fully applied.

c. CIVIL RIGHTS

It may appear anomalous to speak of the "civil rights" of a prisoner of war, particularly in the light of the fact that historically prisoners of war could be killed or enslaved—certainly a denial of rights far more important than those denominated "civil." Although the principle that being a prisoner of war was not a dishonorable state and that captives were not held as prisoners of war as punishment, but only to prevent their further participation in the armed conflict, had evolved in the eighteenth century,[349] the theory that a prisoner of war retained "civil rights" is a development which may be ascribed to the twentieth

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[346] See note 343 *supra*.

[347] Article 75(5) of the 1977 Protocol I is quite similar. Compare Article 53 of the Standard Minimum Rules. At the prisoner-of-war camp at Qui Nhon, in South Vietnam, there were separate facilities for women prisoners of war. Originally, women members of the Republic of Vietnam acted as guards, but this was discontinued when it was found impossible to maintain the morale of the women guards!

[348] *See* note 283 *supra*, and the text in connection therewith.

[349] *See* note I-18 *supra*.

century and, really, to the events of World War I.[350] The 1907 Hague Regulations contained no general provision with regard to civil rights. Such a provision made its first appearance in the second paragraph of Article 3 of the 1929 Convention with the rather broad and ambiguous statement that "[p]risoners retain their full civil capacity." As we shall see in the following discussion of various specific civil rights, a number of problems arose in the implementation of this provision.[351] Some prisoners of war (and some Detaining Powers) were misled into assuming that the quoted provision secured for them full civil rights in the territory of the Detaining Power.[352] Actually, a prisoner of war had, in the territory of the belligerent in which he was held (or in the territory of the neutral in which he was interned), only the civil rights which that country elected to permit him to exercise.[353]

The preparation of wills, together with their execution and transmission to the family of the prisoner of war, was probably the most important— and the least controversial— civil right possessed by prisoners of war during World War II. The first paragraph of Article 76 of the 1929 Convention (which derived from Article 19 of the 1907 Hague Regulations) constituted a specific mandate in this area of civil rights. It provided that prisoners of war should receive the same assistance in drafting their wills as did members of the armed forces of the Detaining Power. Moreover, the second paragraph of Article 41 provided for assistance in their authentication; and the first para-

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[350] *See, e.g.*, Article 93, *Agreement between the United States of America and Germany concerning Prisoners of War, Sanitary Personnel, and Civilians* (1918). Pictet refers to Article 72 of Lieber's Code as part of the history of the evolution of prisoner-of-war civil rights; but this merely protected a prisoner of war's personal property and money and is analogous to various provisions of Article 18 of the 1949 Convention, and not to the third paragraph of Article 14 thereof, the major provision with which we will here be concerned. Pictet, *Commentary* 148. [This portion of the *Commentary* is apparently a redraft of Preux, Le problème de la capacité civile des prisonniers de guerre . . ., 35 *R.I.C.R.* 925.]

[351] In 1939 a lengthy article-by-article review of the 1929 Convention by Radu Meitani, a Roumanian, entitled Le régime des prisonniers de guerre (Régime) appeared in three parts in the *Revue internationale française du droit des gens.* It contained a discussion of the second paragraph of Article 3 of that Convention which could have been helpful had there been an opportunity for the study to become more universally known.

[352] 1947 GE Report 119–20. Under the laws of some Detaining Powers, prisoners of war were apparently placed on a par with "any ordinary resident." McNair, *Legal Effects* 93–94. The more general rule is that a prisoner of war will not be considered a "resident" of the country in whose territory he is held in custody. Pictet, *Commentary* 149.

[353] It can, of course, be argued that it would have been inappropriate, and could not have been intended, to secure for a prisoner of war in an international agreement the rights that he would retain in his own country, certainly a matter for domestic law only. 2A *Final Record* 248. However, it is equally clear that there was no intent to give prisoners of war "full civil status" under the laws of the Detaining Power.

graph of Article 41 provided for the furnishing of facilities for the transmission of these documents to the home of the prisoner of war.

Another legal document which ranked with the will in its frequent importance to the prisoner of war and to his family was the power of attorney. Because of this importance, the power of attorney was specifically mentioned in the first paragraph of Article 41 of the 1929 Convention, along with wills. Apart from these two, the phrase "instruments, papers or documents" was used to cover the whole gamut of legal documents which the prisoner of war might find it necessary to execute in his own or in his family's best interest. Needless to say, the Protecting Powers and the ICRC were very frequently called upon to ensure the delivery to the prisoner of war, the execution by him, and the return to his family, of these various documents, each of which was undoubtedly of major importance to the individual prisoner of war and to the family concerned.[354] Normally, of course, a Detaining Power will have nothing to gain by denying assistance to the prisoner of war in the execution of any legal document and its transmission back to his family, as it will rarely have any impact within the territory of the Detaining Power. However, two comparatively minor problems in this regard did arise in Germany (and probably elsewhere) during World War II. The first of these problems was how to meet any legal fees or expenses (for example, fees for the services of notaries and for prothonotarial certificates) which might arise in connection with the legal problems of the individual prisoner of war. The German solution to this problem was that if the prisoner of war had no funds, payment would be made from canteen funds or prisoner-of-war funds.[355] The second problem was with respect to the work time lost by prisoners of war, who were at first permitted to leave their work detachments in order to have consultations on personal problems with the legal adviser of the prisoners' representative. The German solution to this problem was to permit the legal adviser to make occasional visits to the work detachments; and to require that all such consultations take place during "free time."[356] No objection can be seen to either of these decisions.

The area of civil rights in which problems apparently most frequently arose during World War II was, strangely, that of marriage. The position has been advanced, and appears to be correct, that a Detaining Power is free to permit or to prohibit marriage by a pris-

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[354] Janner, *Puissance protectrice* 55; 1 ICRC *Report* 295; Rich, Brief History 488.

[355] *German Regulations*, No. 23, para. 293.

[356] *Ibid.*, No. 43, para. 798.

oner of war.[357] Many Detaining Powers prohibited such marriages.[358] However, a number of Detaining Powers permitted a prisoner of war to marry by proxy if the other party to the marriage resided in the territory of the Power of Origin of the prisoner of war.[359] Of course, this could only be done if the laws of the Power of Origin permitted proxy marriages.[360]

In modern wars Detaining Powers have required prisoners of war to perform labor, including services under contract to civilian employers.[361] What were the rights of a prisoner of war who was injured, perhaps permanently, in an industrial accident? The last paragraph of Article 27 of the 1929 Convention made him eligible for "the enjoyment of the benefit of the provisions applicable to laborers of the same class *according to the legislation of the Detaining Power*" (emphasis added); and it further provided that if such legislation was inapplicable, the Detaining Power would seek compensatory legislation.[362] Some belligerents permitted prisoners of war to make a claim against the responsible "employer," by way of either workmen's compensation or civil suit;[363] however, probably the more general rule precluded either type of remedy for the injured prisoner of war.[364]

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[357] Sereni, Statut juridique 55; Werner, *Croix-Rouge* 276.

[358] *See, e.g.*, Rich, Brief History 445; and Meitani, Régime 281 & 301. The latter stated that in Roumania should a prisoner of war succeed, nevertheless, in getting married, the marriage would be valid.

[359] 1 ICRC *Report*, 294; Rich, Brief History 445. *See German Regulations*, No. 6, para. 3. For a detailed description of the festivities attendant upon a proxy marriage by a German prisoner of war in a camp in the United States, see Hoole, *And Still We Conquer* 48–50.

[360] One commentator is of the opinion that under the second paragraph of Article 3 of the 1929 Convention a Detaining Power could not prevent a prisoner-of-war clergyman from celebrating a marriage between two prisoners of war. Sereni, Statut juridique 56 n.8. While a Detaining Power might permit such a marriage inasmuch as its own nationals are not involved, that it could not prohibit such a marriage if so minded appears to be a rather extreme position.

[361] *See* Chapter III *infra*. Article 28 of the 1929 Convention specifically contemplated such a possibility.

[362] It should also be noted that Article 71 of the 1929 Convention made work-injured prisoners of war eligible for repatriation—unless the injury was voluntary—on the same basis as other seriously sick or seriously wounded prisoners of war.

[363] With respect to the rights of prisoners of war in this area, McNair says that "if he is allowed by the British Government to enter into a contract of service with a farmer, he may recover wages and he may sue for damages for an injury resulting from the negligence of his employer." McNair, *Legal Effects* 93. (If this was ever the method by which a prisoner of war came to work for a civilian employer, it is not the present method, at least in the United States, where the contract for prisoner-of-war labor is between the private employer and the government. Lewis & Mewha 108; U.S. Army *Regs.* paras. 633–50, sec. XI.)

[364] A 1944 opinion of the Judge Advocate General of the United States Army held that prisoners of war were not residents of the United States and, therefore, were prohibited from having recourse to the courts of the United States because

These were the most prominent areas in which there had been an attempt to exercise civil rights, or an actual exercise thereof, during World War II. When the Conference of Government Experts met in 1947, some of the participants supported the inclusion in the Convention of a provision clearly specifying that prisoners of war enjoy no civil rights in the territory of the Detaining Power. They were dissuaded from this, and the Conference merely proposed the addition of a clause to the provision of the second paragraph of Article 3 of the 1929 Convention quoted above, which would state: "they may acquire and exercise all rights granted them by the DP."[365] This was apparently felt to be an inadequate solution to the problem by the ICRC, which attempted to clarify the redrafted article to indicate beyond any question that the "full civil status" which prisoners of war retained under the Convention was that accorded by the legislation of their own country, while at the same time retaining the clause which had been proposed by the Government Experts.[366] With slight editing, this ICRC draft was approved at Stockholm[367] and became the working draft for the 1949 Diplomatic Conference, where it was the subject of several rather extended debates.

When strong objections were voiced at the Diplomatic Conference to the provision as redrafted, the representative of the ICRC explained that what had been attempted was to draft language which would avoid giving prisoners of war the impression (which they had frequently drawn from the 1929 text) that they had full civil rights in the territory of the Detaining Power.[368] This explanation was apparently considered to be inadequate by the representatives of several delegations[369] and, thereafter, the Drafting Committee produced a substantially new version of the provision which was accepted,[370] although not without further debate,[371] and which became the third paragraph of Article 14 of the 1949 Convention. It reads:

Prisoners of war shall retain the full civil capacity which they

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of the provisions of the *Trading with the Enemy Act*, 40 Stat. 411, 417, *as amended*, 50 *U.S.C. App.* §7*b* (*1970*). SPJGW 1943/19573. However, a 1945 opinion of that same office concluded that "although the precedents on the point are not conclusive, it is very probable that the courts would allow a prisoner of war to maintain an action" for injuries sustained because of the negligence of a prisoner-of-war labor contractor. SPJGW 1945/1878. This opinion was subsequently reaffirmed on the basis of the fact that Federal and state workmen's compensation acts were, for the most part, inapplicable to prisoners of war. SPJGW 1945/3028. *See*, generally pp. 249–252 *infra*.

[365] 1947 GE Report 119–20. It was also proposed to edit the original clause very slightly.

[366] *Draft Revised Conventions* 60.

[367] Revised Draft Conventions 57.

[368] 2A *Final Record* 248.

[369] *Ibid.*, 249.

[370] *Ibid.*, 350.

[371] *Ibid.*, 400 & 403–04.

enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.

The Coordination Committee subsequently recommended the elimination of the words "which they enjoyed at the time of their capture," stating that its proposal was made in order to permit the exercise of their civil rights by prisoners of war who reached their majority while in captivity.[372] The British representative expressed the opinion that no Detaining Power would interpret that clause so as to deny their civil rights to such prisoners of war.[373] A problem of far greater importance created by that clause is to find a reason why an international humanitarian agreement should restrict the civil rights granted to a prisoner of war by his own Power of Origin to those in existence on the date of his capture.[374] If, for example, a Power of Origin has no law permitting proxy marriages at the time that a prisoner of war is captured, there does not appear to be any valid reason why he should be denied, by the terms of an international agreement, the benefit of a law subsequently enacted by his Power of Origin which permits proxy marriages and which, perhaps, is specifically stated to be applicable to then prisoners of war, among others.[375] During and after World War II the lack of adequate existing legislation relating to the civil-rights problems of prisoners of war and their families was a matter of major concern in France.[376] Under the clause above referred to, in a similar future situation, no corrective legislation enacted by the French Parliament would apply to the very persons whom it was desired to assist!

That the overall Article 14, third paragraph, will clarify the situation as it existed under the second paragraph of Article 3 of the 1929

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[372] *Ibid.*, 400.

[373] *Ibid.* The ICRC has since conceded that this is one possible interpretation of the clause; but has rejected it as "contrary to the spirit of the principle stated in the Article." Pictet, *Commentary* 149.

[374] This was stated to be the meaning of the provision. 2A *Final Record* 403–04.

[375] In the United States a treaty such as the 1949 Convention is a part of "the supreme law of the land." Article VI, United States Constitution. Suppose that, after a citizen of the United States is captured, the state in which he has his domicile enacts a statute authorizing proxy marriages, something which had previously been specifically prohibited. The prisoner of war thereafter marries by proxy in accordance with the provisions of the new law and with the permission of the Detaining Power. The validity of the marriage would be subject to attack as being contrary to the self-executing limitation contained in the third paragraph of Article 14, part of the supreme law of the United States.

[376] Sevant, Le droit des prisonniers de guerre; Charrière & Duguet, *Traité théorique et pratique des Prisonniers de Guerre, Deportés et Travailleurs en Allemagne en droit français; and* Charon, De la condition du prisonnier de guerre français en Allemagne au regard du droit privé, (cited at Pictet, *Commentary* 150 n.1).

Convention appears doubtful in other respects as well. Prisoners of war are stated to have "the full civil capacity which they enjoyed at the time of their capture";[377] and the Detaining Power may not restrict the exercise of those rights, "either within or without its own territory . . . except in so far as the captivity requires." A proxy marriage certainly does not so conflict with the status of captivity as to "require" the Detaining Power to prohibit it. Does this mean that the Detaining Power may no longer do so if proxy marriages were permitted by the laws of the Power of Origin at the time of capture and even if they are prohibited by the laws of the Detaining Power? Suppose that a prisoner of war owns property in the territory of the Detaining Power. May he sell that property if the laws of the Power of Origin at the time of capture permit him to do so and even if the laws of the Detaining Power prohibit such sales? These are but a few of the numerous problems which the provisions of the third paragraph of Article 14 raise, the answers to which will have to be given at some future date. Far fewer difficulties would have been created had the 1949 Diplomatic Conference accepted the provision approved at Stockholm[378] without the extensive tinkering in which it engaged, the sole effect of which was to confuse what had been largely clarified.

The first paragraph of Article 120 and the first two paragraphs of Article 77 of the 1949 Convention are concerned with the drafting, execution, and transmission of legal documents, including wills and powers of attorney. It will be recalled that the first paragraph of Article 76 of the 1929 Convention required the Detaining Power to afford the same assistance to prisoners of war in the drafting of wills as it did to members of its own armed forces.[379] The provisions of the 1949 Convention adopt a somewhat different approach. While the second paragraph of Article 77 again requires the Detaining Power to facilitate the preparation and execution of legal documents, it also specifically requires the Detaining Power (1) to allow prisoners of war to consult a lawyer,[380] and (2) to arrange for the authentication of

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[377] The legislative history of the words "at the time of their capture" as used here (and in the third paragraph of Article 22) is rather strange for still another reason. The Rapporteur pointed out that the word "capture" had been deleted everywhere else "in order to give the Convention the widest scope possible by covering members of armed forces taken prisoner on surrender or in other circumstances which cannot, properly speaking, be described as capture." 2B *Final Record* 324. (*See* note I-133 *supra*.) The words in the French version of the third paragraph of Article 14 [and of the third paragraph of Article 22] were accordingly changed to *"au moment où ils ont été faits prisonniers"*—but the words "at the time of their capture" were left untouched in the English version!

[378] Revised Draft Conventions 57.

[379] *See* p. 181 supra.

[380] No mention is made as to how this is to be accomplished if there is no prisoner-of-war lawyer available. Under the 1929 provision, a military lawyer of the Detaining Power would have had to be made available if this was the procedure

their signatures.[381] Moreover, the first paragraph of Article 120 provides that prisoner-of-war wills be so drafted as to satisfy the requirements of the laws of the Power of Origin, the latter having the obligation to inform the Detaining Power of the legal requirements in this respect; the first paragraph of Article 77 requires the Detaining Power to provide facilities for the transmission, through the Protecting Power or the Central Prisoners of War Agency, of the executed documents; and the first paragraph of Article 120 provides that, at the request of the prisoner of war, the will shall be sent to the Protecting Power; and that, upon the death of the prisoner of war, the will shall be sent to the Protecting Power and a certified copy to the Central Agency.

Some degree of improvement may be found in these new provisions relating to the preparation, execution, and transmission of legal documents. However, in other respects it is very probable that the exercise of civil rights by prisoners of war will be even more restricted than during World War II, despite the very well intentioned, but badly executed, aims of the 1949 Diplomatic Conference.[382]

12. Transfers beween Prisoner-of-War Camps

It would seem that the transfer of a prisoner of war from one camp to another would be a comparatively rare but routine procedure requiring only passing mention in an international agreement such as the 1949 Convention.[383] On the contrary, the draftsmen found it necessary to deal with the subject in all or part of seven different articles, attempting, with considerable success, to cover every aspect of the matter in order to provide adequate protection, both physical and other, to the prisoner of war at a time when he is removed from that which is presumably afforded by a well-organized, permanent camp.[384]

Chapter VIII of Section II of the 1949 Convention, consisting of Articles 46, 47, and 48, was given the title "Transfer of Prisoners of War after Their Arrival in Camp." This was done "so as to avoid any

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followed for the Detaining Power's own military personnel. The Detaining Power appears to continue to have this obligation.

[381] If only witnesses to the signature are required, no problem arises. However, if a document must be notarized, it is extremely unlikely that a prisoner-of-war notary will be available and the use of a notary of the Detaining Power, even if one is made available by the latter, would very possibly create legal problems concerning the validity of the document.

[382] Concerning the rights under the 1949 Convention of a prisoner of war injured in an industrial accident, *see* p. 183 *supra* and pp. 249–252 *infra*.

[383] The subject was not specifically mentioned in the 1929 Convention.

[384] The events of World War II clearly demonstrated that a "death march" can occur on a transfer from one prisoner-of-war camp to another, as well as on the original evacuation. *See, e.g., I.M.T.F.E.* 1047–49; *Trial of Baba Masao;* and *Trial of Mackensen.*

confusion with the Articles on evacuation."[385] While the provisions of the two sets of articles are, in many respects, substantially parallel, those concerned with intercamp transfers include a number of matters not covered by those concerned solely with the original evacuation from the place of capture. It is with these supplementary provisions that we will be primarily concerned here.[386]

The second paragraph of Article 46 contains the basic policy statement with respect to intercamp transfers and, like the first paragraph of Article 20 dealing with evacuations, it is a specific reiteration of the fundamental rule expounded in the first paragraph of Article 13 that prisoners of war must at all times be humanely treated. Once again, as in the first paragraph of Article 20, there is the requirement that transfers shall be effected "in conditions not less favourable than those under which the forces of the Detaining Power are transferred." Generally speaking the Detaining Power realistically should be able to, and therefore should, comply with this requirement, and the situation would be unlike that frequently presented upon the evacuation from the battlefield.[387] Transfers between prisoner-of-war camps will usually take place in what one author very aptly calls "the hinterlands";[388] hence the Detaining Power should be able to furnish the same type of facilities for such transfers as it uses when moving its own troops in the same or similar areas.[389] Moreover, the second paragraph of Article 46 provides that in camp-to-camp transfers the climate to which

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[385] 2A *Final Record* 268 (The Conference of Government Experts had suggested the use of the caption "Transfer between Base Camps" (1947 GE Report 164) but the ICRC had changed this because the term "base camp" does not appear elsewhere in the Convention. *Draft Revised Conventions* 79.) General Dillon, a member of the United States Delegation at the 1949 Diplomatic Conference, clearly errs when he asserts that Articles 45–47 were designed for the purpose of outlawing, among others, "the horrors of the Death March of Bataan." Dillon, Genesis 51. As is well known, that was an original evacuation from the battlefield to a prisoner-of-war camp, and it would fall within the ambit of Articles 19 and 20. *See* pp. 98–104 *supra*. The presence of the quoted statement in the Dillon article is even less understandable when it is noted that at the Diplomatic Conference General Dillon himself stated, in the discussion of Article 38 (now Article 46), that "it was important to indicate, not only in the Article itself, but also in the Chapter heading, the fact that it dealt with transfers from camp to camp." 2A *Final Record* 269.

[386] This section should, of course, be read in conjunction with section B.1 of this chapter, pp. 98–104 *supra*.

[387] *See* p. 101 *supra*.

[388] Spaight, Air Power 229.

[389] Of course, as we shall see, sometimes such transfers may be necessitated by the approach of battle and once again the Detaining Power may be unable to provide the transportation facilities normally used for moving its own troops. But even this would not excuse the inhumane methods adopted by the Germans (3 ICRC *Report* 88–89; *Trial of Mackensen*) and Japanese (*I.M.T.F.E.* 1047–51; *Trial of Baba Masao*) during World War II.

the prisoners of war are accustomed[390] must be taken into account "and the conditions of transfer shall in no case be prejudicial to their health."[391]

The third paragraph of Article 46 parallels the provisions of the second paragraph of Article 20 relating to evacuations. It requires the Detaining Power to provide prisoners of war being transferred with an adequate supply of food and drinking water, as well as clothing, shelter,[392] and medical attention.[393] And the last sentence of that Article requires the Detaining Power to take the precautions necessary to ensure the safety of the prisoners of war during the course of the transfer, "especially in case of transport by sea or air,"[394] and to make a roster of all the prisoners of war involved in the transfer, presumably so that if casualties occur en route it will be possible to identify them. As long as States refuse to agree upon a special marking for vessels or planes being used for the purpose of transferring prisoners of war by sea or by air,[395] it is somewhat difficult to envision exactly what precautions can be taken by a Detaining Power to ensure the safety of prisoners of war during the course of their transfer.[396] Nevertheless, it is foreseeable that new techniques will be developed which

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[390] Presumably, they are "accustomed" to the climate of their homeland, usually that of the Power of Origin, and not to that of the prisoner-of-war camp from which they are being transferred.

[391] These two provisions were added to the Working Draft as a result of a proposal made by the New Zealand representative at the 1949 Diplomatic Conference. 2A *Final Record* 268 & 359–60. He undoubtedly had in mind instances, such as those mentioned in *I.M.T.F.E.* 1047–51 and *Trial of Baba Masao*, where prisoners of war from temperate climates (British, Australians, and Americans, and, probably, New Zealanders), many of them seriously ill, were required to make long marches in a tropical climate.

[392] There is no mention of "shelter" in Article 20 except the inference which may be drawn from the reference to "transit camps" which appears in the third paragraph of Article 20 and the requirements for transit camps set forth in Article 24.

[393] The urgent need for these provisions can easily be found by reference to the experiences which occurred during World War II cited in notes 389 and 391, *supra*.

[394] During World War II there were several tragic incidents of Japanese vessels carrying Allied prisoners of war being torpedoed by American submarines. 12 Morison, *History of United States Naval Operations in World War II* 400–01. It is estimated that 10,000 prisoners of war lost their lives in this manner. Remarks and Proposals 49.

[395] The World War II belligerents would not consider the use of a special marking for the vessels being used to transport prisoners of war because of the strong likelihood of its misuse. 1947 GE Report 166–68; Remarks and Proposals 50. Such a possibility was mentioned at the 1949 Diplomatic Conference but not a single delegate spoke in favor of it. 2A *Final Record* 269–70.

[396] The ICRC would probably interpret this provision to be a general statement covering its specific proposal to require "life-boats, life-belts, etc. for transports by sea; anti-aircraft protection for those by land." 1947 GE Report 167; Remarks and Proposals 49–50. However, for some unknown reason, no reference is made to the foregoing in the discussion of the third paragraph of Article 46 which appears at Pictet, *Commentary* 254–55.

will make it possible for the Detaining Power to afford the prisoners of war being transferred the safety which the third paragraph of Article 46 already requires.

The first paragraph of Article 46 is of debatable value. It provides that before deciding to transfer prisoners of war, the Detaining Power should "take into account the interests of the prisoners themselves"; and that particular account should be taken that the transfers do not increase the difficulty of repatriation. The first provision is, for all practical purposes, meaningless;[397] and the second provision is almost so, given the physical problems which will frequently confront the Detaining Power plus the methods of transportation for repatriation which are available now as well as those which will undoubtedly become available in the future. Certainly, during World War II it would have made repatriation far less difficult if all Germans and Italian prisoners of war held by the United States after their capture in North Africa and in Europe had been detained in the United Kingdom or on the European continent. However, this was not feasible, primarily for logistic reasons but also because of the need for their use in the United States as a labor force. Accordingly, they were transferred from prisoner-of-war camps in the United Kingdom and on the Continent to the United States.[398] It is extremely unlikely that were the identical situation to occur again the United States would act any differently even in the face of this paragraph of Article 46. It is equally unlikely that any other Detaining Power confronted with such a situation would act any differently.[399] Geography, the availability of the necessary space, logistics, labor requirements, and many other factors will be considered by a Detaining Power in making the decision as to whether prisoners of war should be transferred; and as long as the prisoners of war are not thereby deprived of any of the protections of the Convention, the fact that they are being moved farther away

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[397] Support for this conclusion can be found in the manner in which the provision is treated in *ibid.*, 253–54.

[398] The peak number of prisoners of war held within the territory of the continental United States was 425,871 in May 1945. Lewis & Mewha 90–91. By June 1946 all except 162 (who were serving prison sentences for postcapture offenses) had been returned to Europe. *Ibid.*, 91, Table 2, n.*a*.

[399] The movement of all Allied prisoners of war by the Japanese in Borneo from Sandakan and Kuching to Ranau (*I.M.T.F.E.* 1047–49; *Trial of Baba Masao*) was a logical one even though their removal inland from a port undoubtedly would have made their repatriation more difficult. An Allied landing was anticipated—and did occur. The Japanese army could not be expected to leave these prisoners of war in a place where they might well be retaken by their own forces. No Detaining Power would do so, even if their removal would inevitably make their ultimate repatriation more difficult. It was not the fact of their movement, but the methods employed in moving these prisoners of war, which were found to have violated the law of war.

from their homeland, and perhaps from airfields or ports, will make little difference.[400]

It will be recalled that the second paragraph of Article 19 provides that wounded and sick prisoners of war may be temporarily retained in the combat zone, despite its inherent dangers, if evacuation would constitute an even greater risk to their well-being.[401] The first paragraph of Article 47 contains a prohibition against the transfer of such prisoners of war if their recovery will be impeded as a result, "unless their safety imperatively demands it."[402] The transfer of seriously wounded and seriously sick prisoners of war whose recovery would be adversely affected by the move would be justified if, for example, they were in an installation located in an area which, because of military developments, had become subject to bombardment; it would *not* be justified merely because of the impending likelihood of its being overrun by enemy infantry. Moreover, the second paragraph of Article 47 carries this matter a step further, prohibiting the transfer of *all* prisoners of war from a camp which is threatened by the approach of the combat zone, unless such transfer can be safely accomplished under "adequate conditions"—which must be intended to mean under the conditions set forth in the last two paragraphs of Article 46; with an escape clause which permits their movement if "they are exposed to greater risks by remaining on the spot than by being transferred"[403] —a decision which the Detaining Power will make unilaterally and

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[400] Suppose that during World War II there had been 100,000 German prisoners of war in camps in the United Kingdom which had been built to accommodate 25,000—and the necessary additional space was just not available; while in the United States, prisoner-of-war camps, west of the Rocky Mountains, built to accommodate 100,000 prisoners of war, were almost empty. Wouldn't the surplus 75,000 German prisoners of war in the United Kingdom have been better off overall if they were transferred to the camps in the United States even if this meant that when repatriation ultimately occurred they would be some 4,000 miles further away from Germany?

[401] *See* pp. 99–100 *supra*.

[402] In Article 25 of the 1929 Convention the escape clause was "unless the course of military operations demands it." Obviously, the standard of that clause has been changed from one catering to the needs of the Detaining Power to one for the greater protection of the prisoners of war.

[403] It will be noted that under the second paragraph of Article 19 wounded and sick prisoners of war may only be *retained* in the combat zone if they would run greater risks by being evacuated; while under the second paragraph of Article 47 prisoners of war may only be *transferred* from camp to camp if they would run greater risks by remaining on the spot. This seeming inconsistency is, in fact, logical. In the first instance, the tendency of the troops of the Capturing Power would be to care little if the newly captured prisoners of war were kept in the combat zone and thus continued to be exposed to the dangers of that area; in the second instance, the tendency of the Detaining Power would be to desire to move the prisoners of war in order to overcome the possibility of their rescue by their own or allied armed forces. In each case, the provision of the Convention is directed against the natural tendency of the Detaining Power or its agents.

which will, of course, be based wholly upon subjective considerations.

Most camp-to-camp transfers will be made in the self-interests of the Detaining Power. Thus, while the movement of a proportion of the prisoners of war from an overcrowded camp to one which is less crowded, or which, perhaps, is just being opened, will undoubtedly improve the lot of the prisoners of war, in most cases it will be done by the Detaining Power not for this reason but because it will ease logistic problems, or move prisoner-of-war labor to an area where it is more urgently needed, or because of the danger of losing control over an overcrowded prisoner-of-war camp.[404] Similarly, while the transfer of prisoners of war from one camp to another because of the approach of the combat zone will usually mean that they are being moved from a place where they may suffer some harm to a place of comparative safety, it is an action which will be taken by the Detaining Power basically in its own interest in order to prevent escape or release. The Detaining Power is thus given the choice: transfer the prisoners of war under conditions which will ensure their safety and well-being; if that is not possible, do not move them, even is the possibility exists of the camp being overrun by the enemy. During World War II several Detaining Powers elected to move the prisoners of war in order to prevent their rescue, but moved them under conditions which were so horrendous that they cost the lives of a large proportion of the prisoners of war who were moved.[405] Article 47 was drafted and included in the Convention in order to codify the requirements with which the Detaining Power must be able to comply if it proposes to move prisoners of war so as to prevent their being retaken by forces friendly to them. The provisions are clear even with the "escape clause" which is subject to the unilateral determination of the Detaining Power. If the Detaining Power elects to transfer the prisoners of war when it is, or should be, obvious that adequate supplies of food, water, proper clothing, etc., are not available, and, as a result, the prisoners of war are adversely affected by the move, the Detaining Power's decision violated Article 47 and the individuals responsible for making that decision and for carrying it out would be subject to trial, conviction, and punishment.[406]

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[404] The United Nations Command discovered the importance of this latter reason for transferring prisoners of war during hostilities in Korea (1950–53). Hermes, *Truce Tent* 255 *et seq.*

[405] *See* notes 389 and 391 *supra.* Thus, the I.M.T.F.E. found that "less than one-third of the prisoners of war who began these marches at Sandakan ever reached Ranau." *I.M.T.F.E.* 1048.

[406] In interpreting these provisions of Article 47, one must not lose sight of the provisions of the first paragraph of Article 23, which contains the flat statement that "[n]o prisoner of war may *at any time* be . . . detained in areas where he may be exposed to the fire of the combat zone." (Emphasis added.) The Detaining Power which elects to transfer prisoners of war as the combat zone draws close to

The other provisions of the Convention relating to transfers from one prisoner-of-war camp to another are, for the most part, administrative in nature, being directed toward maintaining the morale of the prisoner of war rather than his life and continued well-being. Thus, the first paragraph of Article 48[407] requires that the Detaining Power give the prisoners of war sufficient advance information concerning an impending transfer[408] to enable them to pack their belongings and to send their new address to their families;[409] the second paragraph of Article 48 authorizes the prisoners of war to take with them their personal effects, as well as "correspondence and parcels which have arrived for them,"[410] limited to what each can carry, with a 25-kilogram (roughly 55 pounds) maximum; the third paragraph of Article 48 imposes upon the Detaining Power the obligation to arrange for the prompt forwarding of mail and parcels arriving at the former camp after the transfer; and also provides that the camp commander and the prisoners' representative[411] shall agree on the method for the delivery to the transferred prisoners of war of "community property" (such as collective relief shipments) as well as personal effects left at the former camp because of the 25-kilogram weight limit; the fifth paragraph of Article 81 provides that if the prisoners' representative is himself transferred, he must be allowed a reasonable time in which to orient his successor; and the third paragraph of

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the camps in which they are confined might well claim that to have left them in their original camps would have been to subject them to the hazards of the combat zone and would have been a direct violation of the first paragraph of Article 23, even though in making the transfer it could not fully comply with the provisions of Articles 46 and 47; and that it chose the course of action which, in its judgment, was the lesser of two evils.

[407] Article 48 of the 1949 Convention is basically an edited version of Article 26 of the 1929 Convention.

[408] Of course, if the transfer is being made under the emergency provisions of the second paragraph of Article 47, this might not be possible.

[409] Article 70 also specifies that when a prisoner of war is transferred to another camp he must be given the opportunity to send a Capture Card (Annex IVB) to his family and to the Central Prisoner of War Agency; and the fifth paragraph of Article 122 places certain duties in this regard upon the Information Bureaux.

[410] This would appear to mean any correspondence and parcels awaiting distribution and which are distributed immediately prior to departure. If these items have been received at an earlier date, and have been distributed and opened, they have become merged in the general category of "personal effects." (In fact, it is somewhat difficult to determine why any such special mention was considered necessary.)

[411] Concerning these latter individuals, *see* pp. 293–307 *infra*.

Article 65 provides that upon transfer the personal financial account[412] of each prisoner of war is to follow him.

It can readily be seen that a number of humanitarian provisions have been included in the 1949 Convention which clearly establish the responsibilities of the Detaining Power and the rights of the prisoners of war in connection with the transfer of the latter from one prisoner-of-war camp to another, whatever the reason for such transfer may be.[413]

13. Financial Resources

Unlikely as it may seem, a prisoner of war has a number of sources of personal funds and there are a great many provisions of the Convention which are concerned with this subject. Inasmuch as few Detaining Powers will allow a prisoner of war to retain or to receive cash, an important element of all escape attempts, the financial assets of each prisoner of war will be represented by book credits. We shall examine here the sources of these credits, the extent to which and the manner in which the prisoner of war may use them, and their ultimate disposition upon the termination of the individual's status as a prisoner of war.

Article 64 requires the Detaining Power to maintain a separate financial account for each prisoner of war consisting of the following items:

Credits

Sums taken on capture:

In currency of the Detaining Power;

In other currencies but converted at his request into the currency of the Detaining Power;

Advances of pay;

Working pay;

Amounts derived from any other source.

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[412] *See pp.* 209–211 *infra.* It will be noted that there is no specific provision for the transfer of the proportionate shares of canteen profits—unless these can be considered to fall within the category of "community property." The ICRC apparently believes that they do (Pictet, *Commentary* 258), although at no time was any mention made of them in the discussion of Article 48 (then Article 40) at the 1949 Diplomatic Conference. For the United States practice during World War II, see note 170, *supra.*

[413] The last sentence of Article 48 provides that the costs of the transfers shall be borne by the Detaining Power. This was merely a retention of the equally useless provision of the last sentence of Article 26 of the 1929 Convention. Apart from the fact that Article 15 makes the Detaining Power responsible for all of the expenses of maintaining prisoners of war, it is inconceivable that any Power of Origin could ever be prevailed upon to meet the expenses of a transfer of prisoners of war by the Detaining Power from one camp to another, an action which, as has already been noted, will most usually be accomplished by the Detaining Power in its own interests. *See* p. 192 *supra.*

Debits

Payments made to him;[414]

Payments made on his behalf;

Sums transferred at his request.

Each of the foregoing items is based upon substantive provisions appearing elsewhere in the Convention.

a. CREDITS

(1). Sums Taken on Capture

It will be recalled that the fourth paragraph of Article 18 provides that when money in the currency of the Detaining Power is taken from a prisoner of war upon capture, it will be credited to his personal account.[415] When money so taken is not in the currency of the Detaining Power, the prisoner of war has a choice between two alternatives: under the fourth paragraph of Article 18 he may request that it be converted into the currency of the Detaining Power and credited to his personal account;[416] if he elects not to do so, then, under the last paragraph of Articule 18, it will be retained "in [its] initial shape" by the Detaining Power, together with the other articles of value which have been taken from the prisoner of war for reasons of security.[417]

One other aspect of the problem of the possession of actual cash by prisoners of war must be mentioned at this point. It has been stated above that no Detaining Power can be expected to allow a prisoner of war to retain or to receive cash, primarily because of its importance in escape attempts. The first paragraph of Article 24 of the 1929 Convention provided that the maximum amount of cash ("ready money") that a prisoner of war might have in his possession would be determined by agreement between the belligerents. Few such agreements were reached during World War II,[418] and other restrictive measures, such as the issuance by the Detaining Power of special token money

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[414] The second paragraph of Article 64 refers to "payments made to the prisoner [of war] in cash." However, as we shall see, the likelihood of any Detaining Power permitting such payments is rather remote.

[415] *See* pp. 115–116 *supra*.

[416] For some inexplicable reason the early conferences redrafting the Convention thought it necessary to repeat in the section dealing with financial resources the foregoing provisions of the fourth paragraph of Article 18. Despite the close review of all of the relevant articles by a special "Sub-Committee of Financial Experts of Committee II" (2A *Final Record* 529–58), these totally redundant provisions were perpetuated by the complete acceptance of what is now Article 59—which states in two fairly lengthy paragraphs what is stated in the last sentence of the fourth paragraph of Article 18.

[417] "In [its] initial shape" obviously means that the actual currency itself will be placed in safekeeping along with other articles of value taken from the prisoner of war and impounded because they might be useful to a prisoner of war in an escape attempt.

[418] 1 ICRC *Report* 282. Italy and the United States agreed that prisoners of war would not be allowed to have any "negotiable money," but only the Detaining Power's special monetary substitute. [1942] 3 *For. Rel. U.S., Europe* at 25 & 30.

for prisoners of war (scrip, canteen coupons, etc.), frequently negotiable at only the prisoner-of-war camp of issue, were taken by Detaining Powers in order to prevent prisoners of war from having cash in their possession which might facilitate escape.[419] The first paragraph of Article 58 of the 1949 Convention modified its predecessor by providing that the maximum amount of money "in cash or *in any similar form*" (emphasis added) that a prisoner of war may have in his possession shall be determined, not by agreement between the belligerents, but by agreement between the Detaining Power and the Protecting Power, with the right in the Detaining Power to establish a maximum amount until an agreement covering the subject had been reached.[420] Thus, this provision legalizes the use of special "prisoner-of-war money," the use of which had not previously been specifically authorized, even though it had rarely been disputed; authorizes the Detaining Power to establish unilaterally a temporary maximum amount of money, actual or special, which a prisoner of war will be entitled to have in his possession in the prisoner-of-war camp; and substitutes the Protecting Power for the Power of Origin as the other party to the permanent agreement, with the Detaining Power setting the maximum amount which a prisoner of war will be authorized to have in his possession. While this last modification may result in more agreements on the subject in any future international armed conflict than were reached in past conflicts, it is still extremely unlikely that any Detaining Power will agree to permit prisoners of war to retain in their possession any actual cash, particularly in the currency of the Detaining Power.

Another new provision of the first paragraph of Article 58 is also worthy of note. The United Kingdom delegation thought it appropriate to permit a Detaining Power to confiscate any money in excess of the specified maximum found in the possession of prisoners of war and, accordingly, proposed that the wording of the draft provision be amended to read that "[a]ny amount in excess [of the permitted maximum], *which was properly in their possession*" (emphasis added) would be credited to their personal accounts.[421] Obviously, excess amounts which are *not* properly in their possession will be forfeited

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[419] McKnight, POW Employment 62; Kisch, War-prisoner money 452 & 455; Rundell, Paying the POW 123; 1 ICRC *Report* 288. Substantially the same procedure had been followed during World War I. Belfield, Treatment 144.

[420] The authorization for the Detaining Power to set a temporary maximum (which may become semipermanent, or even permanent, if difficulty is encountered in reaching an agreement with the Protecting Power) necessarily implies that some maximum amount will be set, even though it may well be limited to special prisoner-of-war money.

[421] 2A *Final Record* 475. Of course, once again conversions of currency other than that of the Detaining Power taken from a prisoner of war when properly in his possession will be made only upon his request.

and will not be credited to their accounts. This is the type of provision which this author has found to be lacking in the fourth paragraph of Article 18.[422]

(2). Advances of Pay

It has long been the custom for the Detaining Power to make advances to officer prisoners of war on account of their pay so that they would have funds with which to purchase tobacco, toilet articles, etc., beyond that which might be issued to them or which might reach them in relief parcels.[423] Article 17 of the 1907 Hague Regulations provided that officers would receive the same pay as officers of equivalent rank in the armed forces of the Detaining Power, the amount so advanced to be ultimately refunded by the Power of Origin.[424] Article 23 of the 1929 Convention had a somewhat similar provision but with the proviso that in no case would the pay received exceed the pay to which they were entitled from the Power of Origin.[425] Once again, specific provision was made for reimbursement by the Power of Origin at the end of hostilities.[426]

Apparently, these provisions of the 1929 Convention worked no more effectively during World War II than their predecessors had

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[422] *See* pp. 115–116 *supra*. It is somewhat difficult to conceive of circumstances under which the possession of an excess amount of money by a prisoner of war in a prisoner-of-war camp would ever be "proper"—unless he can show that he had it at the time of capture and no one from the Detaining Power had ever searched him or even asked for the surrender of cash (or unless the Detaining Power is willing to accept the frequently advanced claim that it was won by gambling with other prisoners of war).

[423] This was probably a holdover from the days when officers, while awaiting exchange, were paroled locally and had the obligation to arrange for their own board and lodging and to pay for it. Concerning exchange and parole, *see* pp. 397–402 *infra*.

[424] During World War I Germany did not pay British officers who were prisoners of war despite this provision, so the British reciprocated by putting German officer-prisoners of war on special rates. United Kingdom, Foreign Office, *The Treatment of Prisoners of War in England and Germany during the First Eight Months of the War* 12–13. At a later date, when the Germans proposed that both sides should comply with the provision, the British military authorities would not agree—not only because they had learned that there was practically nothing that a British prisoner of war could buy in Germany, but also because whatever he was paid by the Detaining Power was deducted from the amount paid to his family and this could have had serious consequences. Belfield, Treatment 146.

[425] After the British experiences of World War I (note 424 *supra*), it is surprising that this was the only relevant change in the provision.

[426] One very important, and needed, addition was a provision for the fixing of the rate of exchange by agreement between the belligerents with a proviso that, absent such an agreement, the rate in effect at the opening of hostilities would be used. A number of agreements were reached on this subject. 1 ICRC *Report* 283–84. Nevertheless, problems on rates of exchange did arise. *Ibid.*, 284.

worked during World War I.[427] As a result, the preliminary conferences recommended, and the 1949 Diplomatic Conference adopted, what is now Article 60, containing a number of major changes in the basic approach to the problem. These include (1) a provision for advances of pay to enlisted men (other ranks) as well as to officers; (2) elimination of the practice of tying the amount of the advance of pay to the pay scale of the armed forces of either the Detaining Power or the Power of Origin; (3) specifying exactly what the advance in pay will be for each rank from private to general; (4) using the value of the Swiss franc[428] as the common denominator with each Detaining Power converting the amount of the advance in pay specified in Swiss francs into an equivalent amount in its own currency based on the rate of exchange;[429] and (5) providing a method by which the Detaining Power may institute a specific temporary system of advances in pay pending the conclusion of a special agreement with the Power of Origin.[430]

The first paragraph of Article 60 divides all military ranks into five categories and specifies the monthly advance in pay each category is to receive, the range being from 8 Swiss francs for Category I ("Prisoners ranking below sergeants") to 75 Swiss francs for Category V

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[427] A survey made by the United States in November 1945 disclosed that there had apparently been no national policy in Germany and that advances of pay were different in amount in almost every prisoner-of-war camp. American Prisoners of War 19, 28, 60, 71, 79, 90, & 105. The United States, on its part, gave all enlisted prisoners of war canteen coupon books worth $3 every month as a gratuity in order to enable them to make purchases at the camp canteen. Rich, Brief History 437; Hoole, *And Still We Conquer* 36.

[428] This is the Swiss paper franc. As originally drafted, Article 51 (now Article 60) provided for the use of the Swiss gold franc at 203 milligrams of fine gold. As a result of the singlehanded campaign of the delegate from the United Kingdom (Gardner) in the Financial Sub-Committee, in Committee II, and at the Plenary Meeting, the latter finally voted to remove all references to gold from the text of the Convention. 2B *Final Record* 301–02. *See* note 431*a infra*.

[429] There is no specification as to how the rate of exchange to be used will be determined. It could be the rate of exchange on the date of the commencement of hostilities. A more logical, but also more complicated, system would be to use the rate available on the Swiss money market at the time each advance of pay is made.

[430] Article 60, fourth paragraph, requires the Detaining Power to advise the Protecting Power without delay of the reasons for such action. However, the Protecting Power is neither required nor authorized to evaluate or to approve the reasons given.

("General officers or prisoners of equivalent rank").[431] Although for the members of the armed forces of many countries the amounts so provided will appear minuscule, for the governments of other countries the amounts will appear completely disproportionate to the pay scale of their own armed forces, with the advances in pay specified in the Convention perhaps sometimes exceeding the full pay for the various ranks.[432] This was foreseen, and provision was made in the second paragraph of Article 60 for special agreements between the belligerents which would modify the "statutory" scale.[433] Moreover, pending the reaching of such a special agreement, the third paragraph of Article 60 permits the Detaining Power to put into force unilater-

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[431] The following table presents a comparison of a number of illustrative exchange values as of 27 July 1949, when the first paragraph of Article 60 was approved by the Plenary Meeting of the 1949 Diplomatic Conference, and as of 1 January 1977:

Comparative Table of Advances of Pay

	I *Private*	II *Sgt.*	III *Capt.*	IV *Lt. Col.*	V *Gen.*
Swiss franc					
1949	8	12	50	60	75
1977[a]	8	12	50	60	75
British £					
1949[b]	0.50	0.75	3.10	3.75	4.70
1977	1.92	2.88	12.01	14.33	18.02
French franc					
1949[c]	425	640	2,675	3,210	4,040
1977	16.22	24.43	101.39	121.67	152.09
Italian lire					
1949	1,145	1,715	7,150	8,580	10,725
1977	2,845	4,268	17,783	21,339	26,674
United States $					
1949	2.00[d]	3.00[d]	12.50	15.00	18.75
1977	3.27[d]	4.91[d]	20.45	24.54	30.68

Notes:

[a] Had the Swiss gold franc been retained as the standard, the converted figures in the 1977 columns would have been between five and six times larger.

[b] While the United Kingdom had not yet converted to the decimal system in 1949, it is used here in order to simplify comparisons.

[c] This was the "old franc," which was divided by 100 in 1958.

[d] These figures can be compared with the $3.00 per month in canteen coupons which the United States issued gratuitously to all enlisted prisoners of war during World War II. *See* note 427 *supra*.

[432] At the time of signing the Convention on 12 August 1949, Portugal made a reservation to this provision, stating that it would not bind itself to monthly advances in pay in excess of 50 percent of the Portuguese scale of pay. 1 *Final Record* 351. This reservation was not maintained on ratification, 394 *U.N.T.S.* 257.

[433] An agreement reducing the amount of advances of pay would "adversely affect the situation of prisoners of war," and appears to be contrary to the provisions of the first paragraph of Article 6. However, it is obvious that this is what the 1949 Diplomatic Conference intended. 2A *Final Record* 279, 532–38, *passim*. For a discussion of agreements between belligerents, *see* pp. 84–86 *supra*.

ally certain specified emergency measures where it would be seriously embarrassed because the advances in pay which it would otherwise be required to make "would be unduly high compared with the pay for the Detaining Power's armed forces," or for any other reason. These emergency measures require the Detaining Power to continue to credit the individual prisoner-of-war accounts with the amounts specified in the first paragraph of Article 60, but permit it to limit temporarily the use of these credits by the prisoners of war to amounts considered to be "reasonable."[434] However, under the fourth paragraph of Article 60, the Protecting Power must be advised of the reasons for the limitations so imposed by the Detaining Power. One further limitation is still placed on the Detaining Power's actions in this regard: it may not reduce the advance of pay for Category I ("Prisoners ranking below sergeants") below that which the members of its own armed forces receive.[435]

It has been mentioned above that under both the 1907 Hague Regulations and the 1929 Convention, the Detaining Power was to be reimbursed by the Power of Origin at the termination of hostilities for the pay advanced to prisoners of war. Article 67 of the 1949 Convention adopts a somewhat different approach to the problem. While stating affirmatively that advances of pay made by the Detaining Power pursuant to Article 60 are made on behalf of the Power of Origin, it provides for the negotiation of arrangements between the belligerents at the close of hostilities. Moreover, the third paragraph of Article 66 specifically makes the Power of Origin responsible for settling the credit balances due to prisoners of war on their personal accounts upon the termination of captivity. As advances of pay are one of the numerous different types of items included in those accounts, it is unlikely that any of the "arrangements" contemplated by Article 67 will actually eventuate.

There is one other aspect of the "pay" of prisoners of war which must be mentioned, one which had no precedent in prior conventions —"supplementary pay." During World War II it had been necessary to take some action to provide financial assistance to enlisted men (other ranks) who, as we have seen, did not receive "advances of pay" under the 1929 Convention.[436] The 1949 Conference of Government Experts proposed that a provision be included in the new convention then under consideration which would require the Detaining Power

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[434] Unfortunately, no indications are contained in the Article as to the standards to be followed in determining what is "reasonable"—a determination which will be made unilaterally by the Detaining Power. *See* p. 288 *infra*.

[435] Although the wording here is somewhat murky, it was obviously intended to prohibit the Detaining Power from reducing advances of pay to prisoners of war in Category I below the pay of persons of equivalent status in its own armed forces.

[436] Franklin, *Protection*, Appendix XI, Circular Instruction, para. 15.

to accept from the Power of Origin lump sums to be credited to the accounts of the prisoners of war depending on that country, the same amount to be allocated therefrom to all prisoners of the same class.[437] This proposal was incorporated into the draft convention and, with considerable editing, was eventually approved by the 1949 Diplomatic Conference as Article 61 of the Convention (despite the fact that the new Article 60 now provided for advances of pay for all prisoners of war, enlisted as well as commissioned). That Article provides that the Detaining Power shall accept sums forwarded by the Power of Origin for distribution to prisoners of war as "supplementary pay" on the condition that all prisoners of war of the same category shall receive the same amount, and on the further condition that all prisoners of war of that category shall share in the distribution. The supplementary pay is to be credited to the individual prisoner-of-war accounts as quickly as possible and is not to relieve the Detaining Power from any obligation to make advances of pay. While the necessity for such a provision has been greatly reduced by the fact that under the first paragraph of Article 60 *all* prisoners of war are now entitled to advances of pay, the provision may prove of value when a Detaining Power avails itself of the privilege contained in the third paragraph of Article 60, discussed immediately above, and limits the amount of advances of pay made available for prisoner-of-war use.

(3). Working Pay

In the section of the 1949 Convention which is concerned with the labor of prisoners of war, the first paragraph of Article 54 states merely that the working pay shall be fixed in accordance with the provisions of Article 62.[438] This latter Article makes several major changes in the prior practice with respect to the matter of "working pay,"[439] that is, the amount which the prisoner of war is entitled to have credited to his personal account by reason of services actually rendered by him.

The labor of prisoners of war may be utilized by the Detaining Power in four different ways: (1) for the administration and operation of the prisoner-of-war camp itself; (2) working for the armed forces of the Detaining Power; (3) working for other branches of the government of the Detaining Power; and (4) working for private persons who contract with the Detaining Power for prisoner-of-war

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[437] 1947 GE Report 158.

[438] This is unlike the manner in which the matter of currency in the possession of a prisoner of war at the time of capture was dealt with. *See* note 416 *supra*.

[439] Actually, Article 62 refers to "working rate of pay" twice and to "working pay" four times, while Articles 54 and 64 refer only to "working pay." The term "*indemnité de travail*" is used in the French version of all three of these articles and the difference in English appears to be loose draftsmanship, rather than any intent to convey two different meanings.

labor.[440] Under Article 34 of the 1929 Convention it was possible that the first category mentioned would receive nothing in the way of compensation for services performed[441] and that the other three categories would receive varying rates of compensation. The first paragraph of Article 62 of the 1949 Convention clearly contemplates a single basic rate of working pay for all prisoners of war; and the second paragraph of Article 62 specifically provides that working pay shall be paid to those prisoners of war engaged in the administration and operation of the camp.

Article 34 of the 1929 Convention provided that prisoners of war would be "entitled to wages to be fixed by agreements between the belligerents." During World War II no such agreements were concluded.[442] The first paragraph of Article 62, the cognate provision of the 1949 Convention, provides for "working pay"[443] in an amount to be fixed by the Detaining Power, but which may not be less than one-fourth of one Swiss franc for a full working day.[444] The amount so fixed must be "fair" and the prisoners of war must be informed of it, as must the Power of Origin, through the Protecting Power.

With respect to the establishment by the Detaining Power of a "fair working rate of pay," several matters should be noted. First,

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[440] For a complete discussion of the various problems involved with respect to prisoner-of-war labor, see Chapter III *infra*.

[441] The first paragraph of Article 34 of the 1929 Convention specifically so provided and few Detaining Powers elected to be more generous than legally required. McKnight, POW Employment 61–62; Lewis & Mewha 159. The United States did eventually establish certain prisoner-of-war camp jobs as compensable. McKnight, POW Employment 62; Lewis & Wewha 78; *POW Circular No. 1*, para. 88.

[442] 1 ICRC *Report* 286. Although a number of statements such as that contained in the text may be found, and the conclusions of a number of students of the practices of the United States during World War II are to the same effect (*e.g.*, Lewis & Mewha 77), at least a limited agreement in this respect was reached by Italy and the United States in 1942. [1942] 3 *For. Rel. U.S., Europe*, at 25 & 30.

[443] The word "wages" of the 1929 Convention was intentionally discarded and the words "working pay" substituted in order to avoid invidious comparisons between civilian wages and the compensation paid to prisoners of war. 2A *Final Record* 280, 539, & 557.

[444] This is, of course, once again, the Swiss paper franc, not the gold franc. 2B *Final Record* 302. The inadequacy of the minimum thus set by the first paragraph of Article 62 which amounted to approximately 6 cents a day in money of the United States in 1949, is illustrated by the fact that over a century ago, in 1864, during the American Civil War, the Federal Government had set the rate of prisoner-of-war pay at 10 cents a day for skilled workers and 5 cents a day for the unskilled! Lewis & Mewha 39. During World War II the United States paid prisoners of war 80 cents a day as compensation for their labor. *Ibid.*, 77. Under the incentive of the piecework system it was possible to increase this to $1.20 a day. *Ibid.*, 120. In 1942 the United States proposed, unsuccessfully, that the enemy belligerents agree to three Swiss francs a day (then approximately 80 cents in American money) as the wage to be paid prisoners of war. Rich, Brief History 419.

no basis can be found in the history of the evolution of this provision for attempting to determine what is "fair" by comparing the "working pay" of prisoners of war with the wages earned by civilian workers. There are too many diverse and unequal factors involved;[445] and the extremely nominal minimum set by the first paragraph of Article 62 would seem to indicate clearly that there was no intention on the part of the 1949 Diplomatic Conference to establish any such relationship. Second, while there appears to be nothing to preclude a Detaining Power from establishing a fair basic "working rate of pay," and then providing for amounts in addition thereto for work requiring greater skill, or heavier exertion, or greater exposure to danger, or as a production incentive, no authority exists for establishing different working rates of pay for prisoners of war of different nationalities who have the same competence and are engaged in the same types of work.[446] And finally, the rate established as "fair" may not thereafter be administratively reduced by having a part of it "retained" by the camp administration. The authority for this procedure, which was contained in Article 34 of the 1929 Convention, has been intentionally deleted from the 1949 Convention.[447]

It should be noted that the 1949 Convention, unlike the second paragraph of Article 34 of the 1929 Convention, does not contain any provision for agreements between the belligerents with respect to working pay. As drafted at Stockholm, there was a fourth paragraph to Article 62 which provided that belligerents could, by special agreement, "change the scale."[448] This was objected to at the 1949 Diplomatic Conference because it was subject to being construed as permitting agreements lowering the working pay below the specifically prescribed minimum;[449] and if it only meant agreeing to *increase* the working pay, it was unnecessary because this could already be accomplished under the first paragraph of Article 6—or even unilaterally. As a result of these objections, the proposed fourth paragraph was deleted.[450] There is definitely no legal basis by which belligerents may agree to reduce the working pay below the Convention minimum of one-quarter of a Swiss franc for one full working day.

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[445] For some of these differences, see 2A *Final Record* at 557; Mojonny, The Labor of Prisoners of War under the Geneva Conventions 24. For a contrary view, see Pictet, *Commentary* 315.

[446] During World War II the Germans habitually paid Soviet prisoners of war as little as one-half of the amount paid to prisoners of war of other nationalities. Dallin, *German Rule* 425. Article 16 of the 1949 Convention now specifically prohibits "adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria."

[447] 1947 GE Report 160.

[448] Revised Draft Conventions 73.

[449] 2A *Final Record* 280 & 541. The ICRC had previously taken the same position. Remarks and Proposals 54.

[450] 2A *Final Record* 557.

Several changes have been embodied in the second paragraph of Article 62 of the 1949 Convention with respect to the types of work which entitle a prisoner of war to working pay. Of major importance is the fact that, while Article 34 of the 1929 Convention specifically provided that "prisoners of war shall not receive wages for work connected with the administration, management and maintenance of [prisoner-of-war] camps," the second paragraph of Article 62 of the 1949 Convention is equally specific that prisoners of war "permanently detailed to duties or to a skilled or semiskilled occupation in connection with the administration, installation or maintenance of [prisoner-of-war] camps" *shall be* entitled to working pay. This new Article also contains a specific provision under which "prisoners who are required to carry out spiritual or medical duties on behalf of their comrades" are likewise entitled to working pay. There is nothing in the provision to indicate whether the term "prisoners" refers to the nonmedical service, but medically trained, personnel of Article 32, or to the retained medical personnel of Article 33, or to both. Retained personnel are not, of course, prisoners of war[451]—and it would undoubtedly be attributing to the 1948 Stockholm Conference which drafted this clause[452] an unwarranted refinement in the choice of words if we assumed that it used the term "prisoners" instead of "prisoners of war" because it was referring to retained personnel who technically are not prisoners of war. On the other hand, Article 32 refers exclusively to medical personnel, while the first paragraph of Article 33 refers to both medical personnel and to chaplains. As the relevant portion of the second paragraph of Article 62, quoted immediately above, refers to "spiritual or medical duties," there is certainly justification for assuming that the "prisoners" of that Article are the retained personnel of the first paragraph of Article 33.[453] And, while the prisoners' representative and his advisers and assistants are primarily paid out of canteen funds, if there are no such funds, these individuals, too, are entitled to "a fair working rate of pay" from the Detaining Power.[454] Finally, although not specifically mentioned in Article 62, because enlisted men who are assigned as orderlies in officers' camps are, by the second paragraph of Article 44, specifically exempted from any other work, and because this is, therefore, a full-

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[451] *See* pp. 70–74 *supra.*

[452] Revised Draft Conventions 73.

[453] This is apparently the conclusion reached by the United States as para. 147a of U.S. Army *Regs.* 633–50 provides for the payment of working retained personnel of the same daily rate of pay as is received by prisoners of war.

[454] If canteen funds are available, the third paragraph of Article 62 provides that the prisoners' representative fixes the "scale" of working pay for himself and his assistants, subject to approval by the camp commander.

time job, it appears that they should be entitled to working pay from the Detaining Power.[455]

There is one provision of the 1949 Convention which could render this entire subject relatively moot. Under the last paragraph of Article 34 of the 1929 Convention the pay remaining to the credit of a prisoner of war in his personal account was to be paid to him upon the termination of his captivity.[456] Under the first paragraph of Article 66 of the 1949 Convention, upon the termination of captivity the Detaining Power gives the individual prisoner of war a statement showing the entire credit balance due to him.[457] Thereafter, under the third paragraph of Article 66, it will be the responsibility of the Power of Origin, and *not* of the Detaining Power, to settle any balance of his account which has been certified by the Detaining Power as being due to him. Under these circumstances there appears to be little reason why a Detaining Power should not be extremely generous in establishing its "fair working rate of pay." It can limit the amount that a prisoner of war can use in the canteen and it will merely be creating a future liability on the part of its enemy! This fact may result in the negotiation of agreements between belligerents fixing mutually acceptable *maximum* "working rates of pay," despite the lack of a specific provision for such agreements in the 1949 Convention—agreements which, as has been noted, were not reached under the 1929 Convention where there was a specific provision for them.

(4). Amounts Derived from Other Sources

"Supplementary pay" is, of course, one of the "other sources" from which a prisoner of war may secure credits to his personal account.[458] However, whether governments will make such payments for the benefit of prisoners of war in future international armed conflicts is doubtful in view of the fact that all prisoners of war will be entitled to advances of pay and those who work will, in addition, receive working pay. Under the circumstances, it is probable that a major source of other credits will be pursuant to the first paragraph of Article 63, which directs that prisoners of war be permitted to receive remittances of money sent to them "individually or collectively." In other words, families may send remittances to be credited to the account of the individual prisoners of war; or organizations may send lump sums

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[455] This was the policy followed by the United States during World War II. *POW Circular No. 1*, para. 85. It is also the present approved policy. U.S. Army *Regs.* 633-50, para. 227b.

[456] In the event of his death it was to be forwarded to his heirs through diplomatic channels.

[457] This will, of course, include not only his working pay, but all other credits, less all debits.

[458] *See* pp. 200-201 *supra.*

to be credited, for example, to the accounts of all of the prisoners of war from one country at a particular prisoner-of-war camp.[459]

One other substantial source of credits to the personal accounts of prisoners of war will be that derived from the repair or manufacture of items by them during their off-time. Prisoners of war with unusual skills will frequently do repairs during off-hours; and prisoner-of-war artists and artisans will use their unique talents to create salable products.[460] Although the commercial aspects of the transactions could conceivably be entered into directly between prisoner of war and buyer, the merchandising procedure usually followed is that the canteen acts as a middleman between the prisoner of war and the buyer, who may be another prisoner of war, or a member of the armed forces of the Detaining Power, or even a member of the civilian population.[461] The canteen then turns the funds received for the purchase, less a commission, over to the camp administration which makes the appropriate credit on the personal accounts of the prisoners of war concerned.

b. DEBITS

(1). Payments Made to the Prisoner of War

The second paragraph of Article 64 refers to "payments made to the prisoner [of war] in cash." While, as has been noted, the Detaining Power will rarely permit such payments to be made, the possibility does exist. Of course, when cash, or scrip money, or a canteen coupon book is issued to the prisoner of war, a debit in the appropriate amount will be made on his account.

There is one particular use of cash which was envisaged by the draftsmen of the Convention—for the purchase of "services or commodities" outside of the camp. The second paragraph of Article 58 provides that where such purchases are permitted, the prisoner of war will either make the payment himself or it will be made for him

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[459] The possibility of such remittances will, of course, depend largely upon the financial condition and exchange regulations of the country of the would-be remitter.

[460] *See* pp. 236–237 *infra*. The ingenuity of the prisoner of war in this regard is well illustrated by an episode related by a former labor officer for a prisoner-of-war camp in England, which included the theft by the prisoners of war of baling string, cotton, etc., from the farms on which they worked during the day, the manufacture of these items into rope-soled shoes during the evening, and their subsequent sale on the same farms. Barker, *Behind Barbed Wire* 103.

[461] The policy of the United States is to permit sales only through the canteen. U.S. Army *Regs.* 633–50, para. 233. A provision limiting the prisoner of war to an hourly rate of compensation which may not exceed the daily rate for paid work contained in para. 233f of that Regulation is, perhaps, acceptable for the prisoner-of-war tailor or shoemaker, but will be grossly unfair to the artist or artisan.

by the camp administration and charged to his account.[462] The Detaining Power is directed to promulgate rules establishing the procedure for such transactions. It can be anticipated that the procedure preferred by most Detaining Powers, and which will be established by their rules, will be one pursuant to which payments are made directly to the person from outside the camp by the camp administration and the amount so advanced is charged to the prisoner of war's account.[463]

(2). Payments Made on Behalf of the Prisoner of War

The second paragraph of Article 63 provides that the credit balance of the account of each prisoner of war is at his disposal and that the Detaining Power "shall make such payments as are requested." However, this seemingly unlimited provision is in fact limited by a clause which keeps the use of the credit balance "within the limits fixed by the Detaining Power."[464]

As we have just seen, the Detaining Power may make payments on behalf of a prisoner of war pursuant to the second paragraph of Article 58 for the purchase of services or commodities outside of the camp, debiting his account by the amount so paid out. Also, if a prisoner of war is without news from home for a lengthy period of time, or has an emergency, the second paragraph of Article 71 permits him to send a telegram, the charge for which will be debited on his account.[465]

(3). Sums Transferred at the Request of the Prisoner of War

The third paragraph of Article 24 of the 1929 Convention required the Detaining Power to grant facilities for the transfer of any cash ("ready money") taken from a prisoner of war at the time of capture and credited to his account or deposited by him in his account "to banks or private persons in [his] country of origin." Article 38 of that same Convention referred to "consignments of money or valu-

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[462] During World War II the British gave prisoners of war sterling cash for this purpose, but the general practice was otherwise. 2A *Final Record* 278.

[463] The provision concerning payments being made by the prisoners of war themselves was really added to the text in order to permit the United Kingdom to follow its World War II practice if it so desired. *Ibid.*, 278, 531.

[464] This is why the provisions of the third paragraph of Article 66 could make many of the rules relating to financial resources meaningless. *See* p. 205 *supra*. The Detaining Power is not concerned with respect to the ultimate size of the credit balance as long as its use within the territory of the Detaining Power can be restricted; and it need not concern itself that the Power of Origin may do the same thing with respect to the accounts of the members of its own armed forces who are prisoners of war, inasmuch as the action to be taken by it with respect to the credit balances upon their repatriation is a purely domestic matter.

[465] *See* pp. 151–152 *supra*.

ables" which the prisoner of war might send in the mail.[466] However, because of the exchange regulations of the various belligerents, very few transmittals of money from the territory of a Detaining Power to the territory of a Power of Origin actually occurred.[467]

The current provisions relating to this subject are to be found in the second and third paragraphs of Article 63 and in Annex V. The second paragraph of Article 63 provides that, subject to the Detaining Power's financial and monetary restrictions, prisoners of war may have payments made abroad, with remittances to dependents given priority. Of course, the prisoner of war in any future major international armed conflict will once again find his privileges in this regard severely limited, if not completely nullified, by the Detaining Power's exchange regulations—which now have the added legitimacy of specific mention in the Convention.

The third paragraph of Article 63 and Annex V (which is incorporated by reference in the fourth paragraph of Article 63) set forth the procedure by which the prisoner of war, with the consent of the Power of Origin, may send remittance to his home country: (1) the authorities in the Detaining Power prepare a notification containing (a) the identification of each prisoner-of-war payer, (b) the name and address of each payee, and (c) the amount to be transmitted, stated in the currency of the Detaining Power; (2) the notification is signed by each prisoner-of-war payer and countersigned by the prisoners' representative; (3) the camp commander certifies that each prisoner-of-war payer has a credit balance adequate to cover the remittance; (4) each sum to be remitted is deducted from the account of the appropriate prisoner of war, the sums so deducted being placed by the Detaining Power to the credit of the Power of Origin; and (5) the notification is sent by the Detaining Power through the Protecting Power to the Power of Origin. The Power of Origin then has the internal responsibility of actually making payment to the payee.[468]

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[466] The Germans did not permit British prisoners of war to mail the currency of their country back home during World War II. *German Regulations* No. 36, para. 672. However, American currency taken from American prisoners of war at the time of capture could be sent to the United States through the Deutsche Bank in Berlin. *Ibid.*, No. 37, para. 697.

[467] 1 ICRC *Report* 290. In May 1944 the United States authorized Italian prisoners of war to transmit up to $100 in any quarter to their families in Italy. German prisoners of war never received this authorization. Rich, Brief History 440.

[468] If the number of prisoners of war held by both sides is substantially equal, the transmittal of funds by prisoners of war could be entirely a paper transaction, the debits and credits of the Detaining Power and of the Power of Origin balancing each other out. Of course, this type of situation rarely occurs.

c. ADMINISTRATIVE PROCEDURES

In addition to the third paragraph of Article 63 and Annex V setting forth the detailed procedure for the transmittal of prisoner-of-war funds, the Convention contains a number of other administrative instructions with respect to the maintenance of the prisoner-of-war accounts.

The basic provision is, of course, Article 64, which establishes the accounts themselves and enumerates the several general categories of credits and debits.[469] Article 65 provides some of the routine accounting procedures to be followed, all of which are obviously intended to protect the prisoner of war by ensuring that he receives all of the credits to which he is entitled and that no debit is made without his consent. Thus, the first paragraph of Article 65 requires that every entry in a prisoner-of-war account must be certified by the signature or the initials of the prisoner of war or of the prisoners' representative acting on his behalf. The second paragraph of Article 65 requires that the Detaining Power afford the prisoner of war the opportunity to check his account and to obtain a copy of it.[470] When a prisoner of war is transferred from one camp to another, the third paragraph of Article 65 provides that his account will likewise be transferred. When he is transferred from one Detaining Power to another, he is to be given a certificate showing his credit balance; and unconverted currency (money taken from him at the time of capture which was not in the currency of the first Detaining Power and which he had elected not to have converted) is likewise to be transferred.[471] The last paragraph of Article 65 contains the rather strange provision that the belligerents "may agree to notify each other at specific intervals through the Protecting Power, the amount of the accounts of the pris-

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[469] *See* pp. 194-195 *supra.*

[470] The second paragraph of Article 65 also authorizes the representatives of the Protecting Power to inspect the accounts when they visit a prisoner-of-war camp. Except that they might find generalities (*i.e.*, no credits for advances of pay or working pay, no signatures or initials to certify debits, etc.) the inspection by the representatives of the Protecting Power will be of value only when it is concerned with the complaint of a specific prisoner of war with reference to his personal account.

[471] The Detaining Power to which he is transferred will probably allow the prisoner of war to retain the certificate for use under the third paragraph of Article 66, not allowing him to use the credit balance while in its custody. If the unconverted money includes any currency of the new Detaining Power, this will now be credited to his account in accordance with the provisions of the fourth paragraph of Article 18, and the first paragraphs of Articles 58 and 59. This was the procedure followed during World War II. Rich, Brief History 439.

oners of war."[472] As far as appears, such a notification would merely inform the Power of Origin of the amount that its indebtedness (under the third paragraph of Article 66) to the members of its armed forces who are prisoners of war would have been if the armed conflict had ended on the date to which the amounts of the prisoner-of-war accounts were computed.[473]

Finally, the rules for the ultimate closing of the prisoner-of-war accounts upon the termination of captivity by release or repatriation are set forth in Article 66. The first paragraph of Article 66 requires that at such time the Detaining Power give to the prisoner of war a certified statement of his account showing the credit balance due him;[474] while the third paragraph of Article 66 places upon the Power of Origin the responsibility for actually settling the account.[475] And

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[472] It is obvious that this provision is ambiguous. Does it mean the total amount due on all prisoner-of-war accounts—or does it mean the amounts due on each separate prisoner-of-war account? The original proposal, made by the Canadian delegate at the 1949 Diplomatic Conference, used the word "amount." 2A *Final Record* 282. The Sub-Committee of Financial Experts approved this proposal, the meaning of which was not explained. *Ibid.*, 546–47. On 29 June 1949 the Sub-Committee decided to coordinate the French and English texts to read: *"les montants figurant aux comptes des prisonniers de guerre* [the amounts of accounts of prisoners of war.]" *Ibid.*, 552. Nevertheless, its Report, submitted two days later, on 1 July 1949 used the words, "the amount of accounts of the prisoners of war" (*Ibid.*, 555), and this remained the form in which it was finally adopted. The French version continued in the plural, although the word *"les montants"* did somehow become *"les relevés"* in the final version. Presumably, it is the amount of each individual account which was intended, but the final English version does not specifically so indicate. Of course, inasmuch as this provision requires an agreement between the belligerents in order to become effective, the ambiguity can be resolved in such an agreement.

[473] The ICRC says that the value of the provision is that it allows the Power of Origin to see how the Detaining Power is fulfilling its obligations. Pictet, *Commentary* 325–26. As only totals will be given, this appears doubtful.

[474] The second paragraph of Article 119 provides that "on repatriation" impounded articles of value and unconverted currency will be restored to each prisoner of war and that if this is not done these items will be sent to the Detaining Power's Information Bureau. That Bureau, under the last paragraph of Article 122, has the obligation to send to the Power of Origin "all personal valuables, including sums in currencies other than that of the Detaining Power." Although Article 119 refers only to "on repatriation," the last paragraph of Article 122 refers to prisoners of war who have been "repatriated or released, or who have escaped or died."

[475] The 1949 Diplomatic Conference intentionally departed from the prior system under which each prisoner of war was to be given his credit balance in cash prior to repatriation. 2A *Final Record* 568. What the Power of Origin actually does in this regard will, of course, be solely a matter of domestic concern. *See* note 464 *supra*. (At the time of signing the Convention on 12 August 1949, Italy made a general reservation to this provision. 1 *Final Record*, 348. This reservation was not maintained on ratification. 120 *U.N.T.S.* 299.) Soviet International Law 432 erroneously states that the balance due each prisoner of war "is handed to him when captivity is terminated."

the second paragraph of Article 66 states that the provisions of the article may be varied by agreement "between any two of the Parties to the conflict."[476]

In the cases referred to above, of release and repatriation, as well as in cases of the termination of the captivity by "escape, death or any other means," the Detaining Power is required by the first paragraph of Article 66 to send to the Power of Origin, through the Protecting Power, lists identifying the prisoners of war concerned and certifying the amount of the credit balance of each one.[477]

There remains to be mentioned only one last facet of the financial aspects of the life of the prisoner of war—claims. This subject is dealt with in Article 68.[478] The second paragraph of Article 68 provides that claims for compensation for personal effects, money, or valuables taken from the prisoner of war upon capture and "not forthcoming on his repatriation"[479] shall be referred to the Power of Origin.[480] This same rule applies to items alleged to have been lost due to the negligence of the Detaining Power, with the proviso that if it is the type of item required for use by the prisoner of war while in custody, the Detaining Power must, at its own expense, replace it. Finally, once again the Detaining Power must provide the prisoner of war with a certified statement containing full information as to why the missing items have not been restored to the prisoner of war,

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[476] The agreed variations would certainly apply only to the two belligerents concerned. This provision clearly removes Article 66 from the purview of the first paragraph of Article 6 of the Convention.

[477] It will be noted that the first paragraph of Article 66, the second paragraphs of Article 68 and 119, and the last paragraph of Article 122 vary widely as to the types of termination of captivity to which reference is made. It is believed that this is merely another instance of poor internal coordination and that the intent in each instance was to include *all* relevant cases of the termination of captivity, whether by release, repatriation, escape, death, or any other means.

[478] The first paragraph of Article 68 is concerned with claims arising out of accidents at work. This subject is discussed in connection with civil rights (*see* p. 183 *supra*) and with the overall subject of the employment of prisoners of war (*see* pp. 249-252 *infra*).

[479] *See* the comment in note 477 *supra*.

[480] It must be borne in mind that even though "not forthcoming on his repatriation," the missing items may eventually reach the prisoner of war. *See, e.g.*, note 474 *supra*. For a large-scale analogous program to bring together ex-prisoners of war and the items which were left behind at the time of repatriation, see 3 ICRC *Report* 115–16.

with a copy being forwarded to the Power of Origin through the Central Prisoners of War Agency.[481]

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[481] There is no logic whatsoever to the sudden naming of the Central Prisoners of War Agency as the intermediary in this matter, and it is incomprehensible that the ICRC representative in Committee II did not point this out. The copy of the certificate showing the credit balance, given to the prisoner of war at the same time that he receives this certificate, is, pursuant to the first paragraph of Article 66, sent by the Detaining Power to the Protecting Power for transmission to the Power of Origin, as are others (*e.g.*, the first paragraph of Article 62 and the third paragraph of Article 63). This entire Article derived from a United Kingdom proposal (3 *Final Record* Annex 128, at 75) which contained the reference to the Central Agency and, although a number of other changes were made, apparently no one noted the incongruity of naming the Central Agency to perform the function here allocated to it.

CHAPTER III

THE EMPLOYMENT OF PRISONERS OF WAR

A. INTRODUCTORY

From the days when the Romans first came to appreciate the economic value of prisoners of war as a source of labor, and began to use them as slaves instead of killing them on the field of battle[1] until the drafting and adoption by a comparatively large number of members of the then family of sovereign States of the Second Hague Convention of 1899, no attempt to regulate internationally the use of prisoner-of-war labor by the Detaining Power had been successful.[2] The Regulations attached to that Convention dealt with the subject in a single article, as did the Regulations attached to the Fourth Hague Convention of 1907 which, with relatively minor exceptions, merely repeated the provisions of its predecessor. A somewhat more extensive elaboration of the subject was included in the 1929 Convention; and, although still far from perfect, the provisions concerning prisoner-of-war labor in the 1949 Convention certainly constitute an enlightened attempt to legislate a fairly comprehensive code governing the major problems involved in the employment of prisoners of war by the Detaining Power.[3] The purpose of this chapter will be to analyze the provisions of that labor code and to suggest not only how the draftsmen intended them to be interpreted, but also to attempt to prognosticate what can be expected in actual implementation by Detaining Powers generally in any future major international armed conflict.

B. HISTORICAL

Before proceeding to a detailed analysis of the labor provisions of the 1949 Convention, and how one may anticipate that they will operate in time of such armed conflict, it is both pertinent and appropriate to survey briefly the history of, and the problems encountered in, the utilization of prisoner-of-war labor during and since the

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[1] *See* pp. 2–3 *supra.*

[2] Although, as we shall see, the subject of prisoner-of-war labor has been dealt with by Article 76 of Lieber's Code, Article 25 of the Declaration of Brussels, and in Articles 71–72 of the Oxford Manual of 1880, and while these efforts unquestionably influenced in material degree the decisions subsequently reached at The Hague, none of them constituted actual international legislation.

[3] Pictet, *Recuel* 91.

American Civil War (1861–65). That period is selected because it represents the point at which cartels for the exchange of prisoners of war ceased to have any considerable impact and yet belligerents were apparently still largely unaware of the tremendous potential of the economic asset which was available to them at a time of urgent need.

The American Civil War was the first major conflict involving large masses of troops and large numbers of prisoners of war in which exchanges were the exception rather than the rule.[4] As a result, both sides found themselves encumbered with great masses of prisoners of war; but neither side made any substantial use of its large pool of manpower, although both suffered from labor shortages.[5] This was so despite the fact that Article 76 of Lieber's Code specifically stated it to be a rule of international law that prisoners of war "may be required to work for the benefit of the captor's government, according to their rank and condition"; and despite the valiant efforts of the Quartermaster General of the Union army, who sought unsuccessfully, although fully supported by Professor Lieber, to overcome the official reluctance to use prisoner-of-war labor. The policy of the Federal Government was that prisoners of war would be compelled to work "only as an instrument of reprisal against some act of the enemy."[6]

It will be recalled that in 1874 an international conference, which included representatives from most of the leading European nations, met in Brussels "in order to deliberate on the draft of an international agreement respecting the laws and customs of war."[7] This conference prepared the text which, while never ratified, constituted a major step forward in the effort to set down in definitive manner those rules of land warfare which could be considered to be part of the customary law of nations. It included, in its Article 25, a provision concerning prisoner-of-war labor which adopted, but considerably amplified, Lieber's single sentence on the subject quoted above. The Article contained in the Declaration was, in turn, subsequently adopted almost verbatim in the Oxford Manual in 1880; and it furnished much of the material for Article 6 of the 1899 Hague Regulations and for the same Article in the 1907 Hague Regulations.

Despite all of these attempts and eventual successes in the effort to codify the law with respect to prisoner-of-war labor, the actual utilization of such labor remained negligible during the numerous

[4] *See* pp. 7–8 *supra.*

[5] Lewis & Mewha 27 & 41. For a vivid fictional, but factually accurate, picture of this waste of manpower in the South, with its resulting evils to the prisoners of war themselves, *see* Kantor, *Andersonville.*

[6] Lewis & Mewha 37. These same authors state that "in the Civil War both sides were crippled by a shortage of manpower, yet both sides overlooked the vast labor pool offered by idle prisoners of war." *Ibid.*, 41.

[7] *Final Protocol of the Brussels Conference of 1874. See* p. 8 *supra.*

armed conflicts which preceded World War I. This last was really the first modern international armed conflict in which there was total economic mobilization by the belligerents; and there were more men held as prisoners of war and for longer periods of time than during any previous conflict. Nevertheless, it was not until 1916 that the British War Office could overcome opposition in the United Kingdom to the use of prisoner-of-war labor;[8] and after the entry of the United States into that conflict, prisoners of war held by it were not usefully employed until the investigation of an attempted mass escape resulted in a recommendation for a program of compulsory prisoner-of-war labor in part as a means of reducing disciplinary problems.[9] When the belligerents eventually did find it essential to make use of the tremendous prisoner-of-war manpower pools which were so readily available to them, the provisions of the 1907 Hague Regulations covering this subject proved completely inadequate to solve the numerous problems which arose, thereby necessitating the negotiation of a series of bilateral and multilateral agreements between the various belligerents during the course of hostilities.[10] Even so, the Report of the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," created by the Preliminary Peace Conference in January 1919, listed the "[e]mployment of prisoners of war on unauthorized works" as one of the offenses which had been committed by the Central Powers during the war.[11]

The inadequacies of the 1907 Hague Regulations in this and other areas, revealed by the events which had occurred during World War I, led to the drafting and ratification of the 1929 Convention.[12] It was

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[8] Belfield, Treatment 137. At that same time 75 percent (1,200,000 out of 1,600,000) of the prisoners of war in Germany were already employed. McCarthy, *Prisoner of War* 141; Vizzard, Policy 240.

[9] Lewis & Mewha 57 and source cited therein. This was not the case in France, where the American Expeditionary Force had started planning for prisoner-of-war utilization even before they were captured, the established policy of that command being that all except commissioned officers would be compelled to work. *Ibid.*, 59–62. (In Barker, *Behind Barbed Wire* 97, the present author is credited with having stated that the recommendation made in the United States was that prisoner-of-war labor be used as a disciplinary *measure*. Quite the contrary! It was recommended as a means of keeping the prisoners of war occupied in order to reduce disciplinary *problems*.)

[10] All of the bilateral and multilaterial agreements cited in note I-39 *supra*, had provisions concerning prisoner-of-war labor. The 1918 United States-German Agreement had a section of 11 articles (41–51) dealing solely with this subject For a discussion of the problems which arose with respect to the negotiations of these provisions, *see* Stone, The American-German Conference on Prisoners of War, 13 *A.J.I.L.* 406, 424–28.

[11] 14 *A.J.I.L.* 95, 115 (1920); UNWCC *History* 35.

[12] The International Law Association's Proposed International Regulations, note I-40 *supra*, had a number of provisions in its Article 10 regulating prisoner-of-war labor.

this Convention which governed most of the belligerents during the course of World War II;[13] but once again international legislation based on the experience gained during a previous conflict proved inadequate to control the more serious and complicated situations which arose during a subsequent period of hostilities.[14] Moreover, the proper implementation of any agreement the provisions of which require interpretation must obviously depend in large part upon the good faith of the parties thereto—and as belligerents in war are, perhaps understandably, not motivated to be unduly generous to their adversaries, decisions are sometimes made and policies are sometimes adopted which either skirt the bounds of legal propriety or, perhaps, arguably exceed such bounds. The utilization of prisoner-of-war labor by the Detaining Powers proved no exception to the foregoing. Practically all prisoners of war were compelled to work.[15] To this there can be basically no objection. But during the course of their employment many of the protective provisions of the 1929 Convention (and of the 1907 Hague Regulations which it complemented) were either grossly distorted or simply disregarded.

The leaders of Hitler's Nazi Germany were aware of its shortage of manpower during World War II and appreciated the importance of the additional pool of labor afforded by prisoners of war as a source of that precious wartime commodity. Nevertheless, for a considerable period of time they permitted their ideological differences with the Communists to override their common sense and urgent needs.[16] And

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[13] As the Soviet Union was not a party to this Convention, it considered that its relations with Germany and the latter's allies on prisoner-of-war matters were governed by the 1907 Hague Regulations. 1 ICRC *Report* 412. (No mention was made by the Soviet Union of the situation created by the *si omnes* clause contained in the Fourth Hague Convention of 1907.) Japan, which was likewise not a party to the 1929 Convention, nevertheless announced its intention to apply that Convention, *mutatis mutandis*, on a basis of reciprocity. *Ibid.*, 443.

[14] "The international instruments regulating the treatment of prisoners of war were drawn up on the basis of the experience gained in the war of 1914–18 and did not contemplate the wholesale and systematic use which many countries have since made of captive labor." Anon., Conditions of Employment 169.

[15] In February 1944, only 60 percent of the prisoners of war in the United States were being employed; by April 1945, that figure exceeded 90 percent. Lewis & Mewha 125. In Germany "[t]he mobilisation of prisoner labour [had] been organised as part of the general mobilisation of man-power for the execution of the economic programme. . . ." Anon., Employment in Germany 318. It has been estimated that by February 1944, the 2,500,000 working prisoners of war represented 8 percent of the German labor force. Vizzard, Policy 262.

[16] Thus, it has been stated that the improved feeding of Russian prisoners of war by the Germans in 1942 was instituted in order to obtain an adequate labor performance, and "must be assessed as a tactical sacrifice of dogma for the sake of short-range benefits to the warring Reich." Dallin, *German Rule* 423. In the Milch Case, 2 T.W.C. at 782, the Military Tribunal quoted a 1943 statement of Himmler who, in speaking of the Russian prisoners of war captured early in the

in Japan, which, although not a party to the 1929 Convention, had committed itself to apply its provisions, those relating to prisoner-of-war labor were among the many which were assiduously violated.[17]

Like all of the other belligerents during World War II, the United States found an urgent need for prisoner-of-war labor, both within its home territory and in the rear areas of the embattled continents. One study even goes so far as to assert that the use of the labor of the Italian prisoners of war in the Mediterranean theater was the only thing which made it possible for the United States to sustain simultaneously both the Italian campaign and the invasion of Southern France, thereby hastening the downfall of Germany.[18] Similarly, it was found that in the United States the use of prisoners of war for work at military installations, and in agriculture and other authorized industries, served to release both army service troops and civilians for other types of work which were more directly related to the war effort.[19]

While the benefits of prisoner-of-war labor to the Detaining Power are patent, benefits flowing to the prisoners of war themselves as a result of their use in this manner are no less apparent. The reciprocal benefits resulting from the proper use of prisoner-of-war labor are well summarized in the following statement:

> The work done by the PW has a high value for the Detaining Power, since it makes a substantial contribution to its economic resources. The PW's home country has to reckon that the work so done increases the war potential of its enemy, maybe indirectly: and yet at the same time it is to its own profit that its nationals should return home at the end of hostilities in the best possible state of health. Work under normal conditions is a valuable antidote to the trials of captivity, and helps PW to preserve their bodily health and morale.[20]

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conflict, a very large number of whom did not survive their first winter of captivity, deplored the fact that at that time the Germans "did not value the mass of humanity as we value it today, as raw material, as labor."

[17] The I.M.T.F.E. stated (at 1082) that "[t]he policy of the Japanese Government was to use prisoners of war and civilian internees to do work directly related to war operations." *See also, Trial of Tanabe Koshiro;* Vizzard, Policy 259, & 263.

[18] Lewis & Mewha 199.

[19] Fairchild & Grossman 194.

[20] 1 ICRC *Report* 327. *See also,* Pictet *Commentary* 260; Flory, *Prisoners of War* 71; Girard-Claudon, Les prisonniers de guerre en face de l'évolution de la guerre 151, Feilchenfeld, *Prisoners of War* 47; *PMG Review,* III-372. Article 49 of the 1949 Convention specifically states that the utilization of prisoners-of-war labor is "with a view particularly to maintaining them in a good state of physical and mental health." And, of course, the working pay which a prisoner of war will receive for his labor will frequently permit him to acquire extra items which would otherwise be beyond his reach.

During the close reappraisal of the 1929 Convention which followed World War II, the provisions thereof dealing with the subject of prisoner-of-war labor were not overlooked; and the conferences which culminated in the 1949 Diplomatic Conference, as well as that Conference itself, redrafted many of those provisions of the 1929 Convention in an effort to plug the loopholes which the events of World War II had revealed. While there are obvious differences between the employment of workers available through a free labor market and the employment of prisoners of war, even a casual and cursory study will quickly disclose a remarkable number of similarities. The labor union which is engaged in negotiating a contract for its members with their employer is vitally interested in: (1) the conditions under which they will work, including safety provisions; (2) working hours and the holidays and vacations to which they will be entitled; (3) the compensation and other monetary benefits which they will receive; and (4) the grievance procedures which will be available to them. Because of the uniqueness of prisoner-of-war status, the 1949 Diplomatic Conference felt it necessary, in drafting provisions for the benefit and protection of future prisoners of war, to continue to provide guidance with respect to certain types of problems in addition to those mentioned above, such as the categories of prisoners of war who may be compelled to work (a problem which does not normally exist for labor unions operating in a free civilian society, although it may come into existence to some extent in a total war economy); and, collateral to that, the specific industries in which they may or may not be employed. Inasmuch as these two latter problems lie at the threshold of the utilization of prisoner-of-war labor, they will be considered before those enumerated above.

C. CATEGORIES OF PRISONERS OF WAR WHO MAY BE COMPELLED TO WORK

In general, Article 49 of the 1949 Convention provides that all prisoners of war, except commissioned officers, may be compelled to work. However, this statement requires considerable elaboration and is subject to a number of limitations.

1. Physical Fitness

Under the first paragraph of Article 49 only those prisoners of war who are physically fit may be compelled to work by the Detaining Power; and the work which they are called upon to perform must be of a nature to maintain them "in a good state of physical and mental health." In determining physical fitness, it is prescribed that the Detaining Power must take into account the age, sex, and physical aptitude of each prisoner of war as an individual. It may be assumed that these criteria are to be considered not only in determining whether a prisoner of war should be compelled to work, but also in deter-

mining the type of work to which the particular prisoner of war should be assigned. For example, older prisoners of war should not be assigned to types of work which require great and constant exertion; women prisoners of war should not be assigned to tasks requiring the lifting and moving of heavy loads, tasks which may be beyond their physical capabilities; and male prisoners of war, although physically fit to work, may not have the physical aptitude for certain jobs by reason of their size, weight, strength, lack of experience, etc.[21] It would appear that the provisions of the first paragraph of Article 49 of the 1949 Convention require the Detaining Power to assure the assignment of the right man, from the physical point of view, to the right job.

Under the provisions of Article 31 and the first paragraph of Article 55 of the 1949 Convention, the determination of physical fitness must be made by medical personnel and at regular monthly intervals. It should be noted that the first of the cited articles is a general one which requires the Detaining Power to conduct thorough "medical inspections," monthly at a minimum, primarily in order to supervise the general state of health of all prisoners of war and to detect contagious diseases;[22] while the second, which calls for a "medical examination" at least monthly, is intended to verify the physical fitness of the prisoner of war for work, and particularly for the work to which he is assigned.[23] It is evident that one medical examination directed simultaneously toward both objectives would meet the dual

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[21] During World War II the German use as miners of prisoners of war who did not have the necessary physical aptitude for this type of work and who were inexperienced was a constant source of dispute. The ICRC delegate in Berlin finally proposed to the German High Command that prisoners of war over 45 years of age be exempted from working as miners, but this proposal was rejected by the Germans on the ground that the 1929 Convention made no reference to age as a criterion of physical qualification for compulsory labor. 1 ICRC *Report* 329–31. This situation has now been rectified.

[22] *See* pp. 133-139 *supra.*

[23] The procedures followed in the United States during World War II were as follows: "Prisoners of war . . . are given a complete physical examination upon their first arrival at a prisoner of war camp. At least once a month thereafter, they are inspected by a medical officer. Prisoners are classified by the attending medical officer according to their ability to work, as follows: (a) heavy work; (b) light work; (c) sick, or otherwise incapacitated—no work. Employable prisoners perform work only when the job is commensurate with their physical condition." McKnight, POW Employment 64. The quoted statement was based, at least in part, on *POW Circular No. 1*, para. 87, which was, in turn, taken from Article 48 of the 1918 United States–German Agreement.

obligations thus imposed upon the Detaining Power.[24]

The provisions of the second paragraph of Article 55, authorizing a prisoner of war to appear before the camp medical authorities whenever he considers himself incapable of working, is undoubtedly essential, but it has grave potentialities. Certainly, if a prisoner of war does not feel capable of working he should be given an opportunity to have his condition verified by the medical authorities, not only so that, if medically appropriate, he may be excused from working, but also so that he may receive the medical treatment to which he is entitled under the first paragraph of Article 30.[25] However, it can be anticipated that well-organized prisoners of war, intent upon creating as many difficulties as possible for the Detaining Power, will sometimes be directed by their anonymous leaders to report themselves *en masse* and at frequent intervals as being incapable of working and to request that they be permitted to appear before the medical authorities of the camp. Is the Detaining Power to be helpless if thousands of prisoners of war, many more than can be examined by available medical personnel, all suddenly elect to claim physical unfitness for work and to demand the right to appear before the medical authorities? Where the Detaining Power has good grounds for believing that such is the situation, and this will normally be quite apparent, it would undoubtedly be fully justified in compelling every prisoner of war to work until his turn to appear before the medical authorities was reached in regular order with the complement of medical personnel which had previously been adequate for that particular prisoner-of-war camp. Thus, the act of the prisoners of war themselves in attempting to turn a provision intended for their protection into an offensive weapon, illegal in its very inception, would actually result in the causing of harm to the very people whom it was intended to protect—the truly ailing and physically unfit prisoners of war. If such a procedure is followed by the Detaining Power, the use of the provisions of the second paragraph of Article 55 and the penultimate paragraph of Article 30 will quickly revert to that for which they were intended.

The suggestion has been made that the medical examinations to determine physical fitness for work should preferably be made by the retained medical personnel of the Power of Origin.[26] This suggestion

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[24] Article 31 speaks of "medical inspections," while the first paragraph of Article 55 uses the term "medical examinations." (A similar variance is found in the French version of the 1949 Convention.) It does not appear that any substantive difference was intended, particularly inasmuch as Article 31 considerably amplifies the term "inspection," making it quite clear that much more than a mere visual inspection was intended.

[25] *See p.* 134 *supra.* The second paragraph of Article 55 parallels the general provision contained in the first sentence of Article 30.

[26] Pictet, *Commentary* 212 & 289. For a discussion of "retained medical personnel," *see* pp. 70-74 *supra.*

is apparently based upon the fact that the third paragraph of Article 30, in providing for the general medical care and treatment of prisoners of war, states that they "shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality." However, there is considerable difference between assigning the medical personnel of the Power of Origin to render medical care and treatment to a fellow prisoner of war who is ill or injured, and permitting such personnel to say whether or not the prisoner of war is physically qualified to work. It is not believed that any Detaining Power would, or that the Convention intended that it should, permit retained medical personnel to make final decisions in this regard.[27]

2. Rank

While Article 76 of Lieber's Code did contain the clause specifying that prisoners of war could be required to work "according to their rank," there was really no indication therein that the labor of all prisoners of war, regardless of rank, was not available to the Detaining Power in some capacity. However, Article 25 of the Declaration of Brussels and Article 71 of the Oxford Manual both provided that prisoners of war could only be employed on work that would not be "humiliating to their military rank." Article 6 of the 1899 Hague Regulations reverted to Lieber's rather vague phrase, "according to their rank"; but the 1907 Hague Regulations went a step further, adding to the foregoing phrase the words "officers excepted," thereby for the first time giving a legislative basis to a practice that had, in fact, already been generally followed.[28]

Both the 1929 and the 1949 Conventions are much more specific in this regard, the latter amplifying and clarifying the already much more detailed provisions of its predecessor. Thus, while the first paragraph of Article 49 of the 1949 Convention authorizes the Detaining Power to utilize the labor of "prisoners of war," the second paragraph of Article 49 specifies that noncommissioned officers (NCOs) may only be required to do supervisory work, and the last paragraph of Article 49 states without reservation that officers may not be compelled to work. It thus becomes clear that, as used in the first paragraph of

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[27] Similarly, the function of determining whether a prisoner of war should be repatriated during hostilities for medical reasons is not assigned to the retained medical personnel, but is the responsibility of the medical personnel of the Mixed Medical Commissions consisting of two neutral members and one member appointed by the Detaining Power. *See* Article 112 and Annex II. For a discussion of the Mixed Medical Commissions, *see* pp. 411–412 *infra*.

[28] One Japanese scholar has asserted that during the Russo-Japanese war (1904–05), the Japanese exempted officer prisoners of war from the requirement to work. Ariga, *Guerre russo-japonaise* 114. However, another claims that Japan did not require any Russian prisoners of war to work. Takahashi, ***Russo-Japanese War*** 125.

Article 49, the term "prisoners of war" really refers only to enlisted men below the noncommissioned-officer grade—in other words, privates.

During World War II several problems arose with respect to the identification of noncommissioned officers for labor purposes. In the first place, many NCOs had had their identification documents taken from them upon capture (probably for intelligence purposes) and were thereafter unable to establish their entitlement to recognition of their grade.[29] On the other hand, a number of prisoners of war apparently claimed NCO grades to which they were not actually entitled, probably in order to avoid hard labor.[30] The 1949 Convention attempts to obviate these problems. Thus, Article 21 of the 1929 Convention provided only that, upon the outbreak of hostilities, the belligerents would communicate to one another the titles and ranks in use in their armies in order to assure "equality of treatment between corresponding ranks of officers and persons of equivalent status." This was construed as limiting the requirements of this exchange of information to the ranks and titles of commissioned officers. The first paragraph of Article 43 of the 1949 Convention makes it clear that information is to be exchanged concerning the ranks and titles of *all* persons who fall within the various categories of potential prisoners of war enumerated in Article 4 of the Convention.[31] Further, during World War II the military personnel of each belligerent carried only such identification documents, if any, as that belligerent elected to provide to its personnel. In addition, as just noted, if the prisoner of

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[29] The ICRC has stated that 26,000 German noncommissioned officers who were prisoners of war and whose identity papers had been taken from them in England were compelled to work while interned in the United States because of their inability to prove their status. 1 ICRC *Report* 339. *See* note II-288 *supra*. The German General Staff urged German noncommissioned-officer prisoners of war to work, very probably in order to avoid the deterioration, both physical and mental, which inevitably overtakes the completely inactive prisoner of war. 1 ICRC *Report* 339.

[30] Early in 1945 the military authorities in the United States discovered that many German prisoners of war had false documents purporting to prove noncommissioned officer status. They thereupon required all German prisoners of war who claimed to be noncommissioned officers to produce proof of such status in the form of a *soldbuch* or other official document. Thousands were unable to do so and were reclassified as privates. Rich, Brief History 516. To some extent these may have been the same prisoners of war referred to in the preceding note.

[31] *See pp.* 168–169 *supra*. It appears to the writer that the United States Army may have created problems for some of its members in this respect by the establishment of a "specialist" classification of enlisted men who, although grouped in the same statutory grades as noncommissioned officers, are apparently not such. Manes, Barbed Wire Command 14. The strict interpretation of the term "noncommissioned officers" contemplated by the Soviet Union is evidenced by its desire, expressed at the 1949 Diplomatic Conference, to limit the exemption of noncommissioned officers from the requirement to do work other than supervisory to regular army ("re-enlisted") personnel. 2A *Final Record* 348, 361 & 566.

war did have an identification document in his possession when captured, it was not unusual for the personnel of the Capturing Power to seize these documents for whatever intelligence value they might have, leaving the prisoner of war with no official identification material. The 1949 Convention attempts to remedy both of these defects. The third paragraph of Article 17 requires each belligerent to issue to the members of its armed forces an identification card containing, as a minimum, certain information concerning identity, including rank; prescribes the desirable type of card; provides that it be issued in duplicate; and states that while the prisoner of war must exhibit it upon the demand of his captors, under no circumstances may it be taken from him.[32] This Article, if complied with by the belligerents, should do much to eliminate the problem of identifying noncommissioned officers that existed during World War II and that undoubtedly resulted in denying to many prisoners of war the rights to which they were entitled.[33]

Two other problems connected with the labor of noncommissioned officers are worthy of comment. On occasion, disputes may arise as to the types of work that can be construed as falling within the term "supervisory." The 1949 Diplomatic Conference made no attempt to solve this problem. There is much merit in the position taken by the ICRC that the term denotes "administrative tasks which usually consist of directing other ranks; it obviously excludes all manual labor."[34] The other problem concerns the right of a noncommissioned officer who has exercised the privilege given him under both the 1929 and the 1949 Conventions to request work other than supervisory, thereafter to withdraw his request. During World War II different practices were followed by different belligerents. Thus Germany gave British noncommissioned officers the right to withdraw their requests,[35] while the policy of the United States was not to grant such requests for nonsupervisory work in the first place, unless they were

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[32] *See pp.* 111–112 and 168–169 *supra.*

[33] Many men legitimately promoted in the combat zone may go for long periods of time without having an opportunity to obtain an identification card showing their new ranks and may become prisoners of war during that period. In view of the new concept of "advances of pay" contained in the first paragraph of Article 60, it is all the more important for a sergeant to be able to establish that he is such. *See* pp. 198–200 *supra.*

[34] Pictet, *Commentary* 262.

[35] *German Regulations* No. 13, para. 59. The seeming magnanimity of this provision is somewhat nullified by the last two sentences thereof, which indicate that "the employment of British noncommissioned officers has resulted in so many difficulties that the latter have far outweighed the advantages. The danger of sabotage, too, has been considerably increased thereby."

for the duration of captivity in the United States.[36] It has been urged that, inasmuch as a noncommissioned officer is free to volunteer to undertake nonsupervisory work, he should be equally free to discontinue such work at will—subject to the right of the Detaining Power to provide him with such employment when he volunteers only if he agrees to work for a fixed term, which may be extended upon his request.[37] This appears to be a logical and practical solution to the problem, although it is probably one to which not every belligerent will subscribe.

The last paragraph of Article 49 is very clear that officers cannot be compelled to do any type of work, even supervisory, unless they volunteer. Once they have done so, the problems relating to their labor are quite similar to those relating to the voluntary labor of noncommissioned officers, except that as a matter of practice they were apparently rather generally permitted to discontinue working whenever they decided to do so.[38] In general, the labor of officers has not been the cause of any material dissension between belligerents.[39]

3. Other Prisoners of War Exempted from Working

Scattered throughout the 1949 Convention are a number of other provisions specifically limiting the work which may be required of certain categories of captured enemy personnel, prisoners of war or other, held by the Detaining Power. Thus, medically trained personnel who, when captured, were not assigned to the medical services in the enemy armed forces and who are, therefore, ordinary prisoners of

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[36] U.S. War Dept., Technical Manual TM 19-500, *Enemy Prisoners of War*, Ch. 5, Sec. 1, para. 4c. This is no longer the policy of the United States. U.S. Army *Regs.* 633–50, para. 206a(2) provides that a noncommissioned officer ". . . may at any time, revoke his voluntary request for work other than supervisory work."

[37] Pictet, *Commentary* 262. The *Commentary* continues with the statement that "during the Second World War, however, prisoners of war were sometimes more or less compelled to sign a contract for an indefinite period which bound them throughout their captivity; that would be absolutely contrary to the present provision." The present writer agrees that this should be the rule but confesses himself as unable to identify the provision of the second paragraph of Article 49 of the 1949 Convention which so provides, or to determine wherein, in this regard, it differs from its predecessor, the third paragraph of Article 27 of the 1929 Convention. (Perhaps the *Commentary* is referring to Article 7.)

[38] 1 ICRC *Report*, 338. Inasmuch as the third paragraph of Article 49 states that officers ". . .may *in no circumstances* be compelled to work" (emphasis added), there is even less basis for denying them the right to discontinue work for which they have volunteered then there is for noncommissioned officers. U.S. Army *Regs.* 633–50, para. 206a(1), covering commissioned officers, is substantially identical to the provision relating to NCOs quoted in note 36 *supra*.

[39] 1 ICRC *Report* 337–38. During World War II Japan instituted a "no work no eat" policy for officers. I.M.T.F.E. 1176. An ex-prisoner of war has stated that coercion was used to force officers to volunteer to work. *Schacht Statement.* One writer says that under War Ministry orders officers were "guided" to "volunteer." Vizzard, Policy 263.

war, may be required to perform medical functions for the benefit of their fellow prisoners of war; but if so required, they are, under Article 32, entitled to the treatment accorded to retained medical personnel and are exempted from any other work.[40] Under Article 36 this same rule applies to ministers of religion who were not serving as such when captured. Prisoners of war assigned to provide essential services in officer prisoner-of-war camps as orderlies may not, under the second paragraph of Article 44, be required to perform any other work. Finally, the first paragraph of Article 81 specifies that prisoners' representatives may likewise not be required to perform any other work, but this restriction applies only "if the accomplishment of their duties is thereby made more difficult."[41] While these various provisions are not of very great magnitude in the overall prisoner-of-war picture, they can, of course, be of major importance to the particular individuals concerned.

D. TYPES OF WORK THAT PRISONERS OF WAR MAY BE COMPELLED TO PERFORM

The categories of industries in which prisoners of war may be compelled to work and the types of labor which they may be compelled to perform in those industries have generated much controversy. Long before final agreement was reached thereon at the 1949 Diplomatic Conference, the article of the Convention concerned with this problem had been termed "the most disputed article in the whole Convention, and the most difficult of interpretation."[42] Unfortunately, it appears fairly certain that some of the agreements ultimately reached in this area are destined to magnify, rather than to minimize or eliminate, this problem.[43]

The early attempts to draft rules concerning the categories of labor in which prisoners of war could be employed merely authorized their employment on "public works which have no direct connection with the operations in the theater of war,"[44] or stated that the tasks of prisoners of war "shall have nothing to do with the military operations."[45] The inadequacy of these provisions having been demonstrated

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[40] *See* p. 73 *supra*.

[41] *See* pp. 303–304 *infra*.

[42] 2A *Final Record* 442. Another participant in the 1949 Diplomatic Conference later wrote: "Perhaps no section of the Convention gave rise to more debate and expressions of differences of view than that dealing with 'Labour of Prisoners of War.' At the outset, it appeared that all that could be agreed upon was the fact that the 1929 treatment of the subject was inadequate and ambiguous." Dillon, Genesis 51.

[43] Baxter, Book Review, 50 *A.J.I.L.* 979.

[44] Article 25, Declaration of Brussels; Article 71, Oxford Manual.

[45] Article 6, 1899 *Hague Regulations*. The French (official) version of Article 6 of the 1907 *Hague Regulations* is identical with its predecessor in this regard.

by the events of World War I, an attempt at elaboration was made in drafting the cognate provisions of Article 31 of the 1929 Convention, in which were included not only prohibitions against the employment of prisoners of war on labor having a "direct relation with war operations," but also against their employment on certain specified types of work—"manufacturing and transporting arms or munitions of any kind, or . . . transporting material intended for combatant units."

During World War II these latter provisions proved little more successful than their predecessors in regulating prisoner-of-war labor. The term "direct relations with war operations" once again demonstrated itself to be exceedingly difficult to interpret[46] in a total war in which practically every economic resource of the belligerents is mobilized for military purposes.[47] Each belligerent attempting to comply with the labor provisions of the 1929 Convention found itself required to make a specific determination in all but the very few obvious cases as to whether a particular occupation fell within the ambit of the prohibitions.[48] As could be expected, there were many disputed decisions.

In drafting the proposed new convention aimed at obviating the many difficulties which had arisen during the two world wars, the ICRC attempted a new approach to the prisoner-of-war labor prob-

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[46] "What constituted a direct relation with war operation was a matter of personal opinion or indeed, guess." Dillon, Genesis 52. An anonymous writer for the International Labour Organization found it questionable that the restrictions of the first paragraph of Article 31 of the 1929 Convention concerning work directly connected with war operations were being uniformly interpreted. Anon., Conditions of Employment 186. After the end of World War II the United States Military Tribunal in the *I.G. Farben Case* said (at 8 T.W.C. 1189):

> To attempt a general statement in definition or clarification of the term "direct relation to war operations" would be to enter a field that the writers and students of international law have found highly controversial.

[47] Flory, Nouvelles conception 58; Janner, *Puissance protectrice* 54; Feilchenfeld, *Prisoners of War* 13.

[48] Early in January 1943 the United States adopted the following policy with regard to prisoner-of-war labor:

> Any work outside the combat zones not having a direct relation with war operations and not involving the manufacture of transportation of arms or munitions or the transportation of any material clearly intended for combat units, and not unhealthful, dangerous, degrading, or beyond the particular prisoner's physical capacity, is allowable and desirable.

AG letter of January 1943, subj: War Department Policy with respect to Labor of Prisoners of War, *quoted in* Lewis & Mewha 89. This was obviously so general as to cause many specific problems to arise, and in December 1943 the United States found it necessary to establish a Prisoner of War Employment Review Board (*ibid.*, 113) which was called upon to make a great many decisions in this area. Mason, German Prisoners of War 211. Postwar researchers have collated lists which include literally hundreds of occupations as to which specific decisions were made. Lewis & Mewha 146–47, 166–67, & 203; Tollefson, Enemy Prisoners of War 62 note.

lem. Instead of specifying prohibited areas in broad and general terms, as had been the previous practice, leaving to the belligerents, the Protecting Powers, and the humanitarian organizations the decision as to whether a specific task was or was not prohibited, it decided to list affirmatively and with particularity the categories of labor in which the Detaining Power would be permitted to employ prisoners of war, at least impliedly prohibiting their use in any type of work not specifically listed.[49] The International Red Cross Conference held in Stockholm in 1948, to which this new approach was proposed, accepted the idea of affirmatively specifying the areas in which prisoners of war could be required to work; but, instead of the enumeration of specifics which the ICRC had prepared, the Conference substituted general terms.[50] The ICRC was highly critical of this action.[51] At the 1949 Diplomatic Conference the United Kingdom proposed the substitution of the original ICRC proposal in place of that contained in the draft adopted at Stockholm, and it was this original text, with certain amendments which will be discussed later, which ultimately became Article 50 of the 1949 Convention. While there is considerable merit to the new approach, the actual phraseology of the Article leaves much to be desired.[52] An analysis of the various provisions contained in Article 50 of the 1949 Convention and, to the extent possible, a delimitation of the areas covered, or probably intended to be covered, by each category of work which a prisoner of war may be "compelled" to do,[53] and the problems inherent in each, is in order.

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[49] *Draft Revised Conventions* 82–83.

[50] The proposed new Article 42 (now 50) provided that "prisoners of war may be required to do only work which is normally required for the feeding, sheltering, clothing, transportation and health of human beings." Revised Draft Conventions 69. It is of interest that that was substantially the basic policy that had been followed by the United States in interpreting the provisions of Article 31 of the 1929 Convention. McKnight, POW Employment 54.

[51] Remarks and Proposals 51–53.

[52] In its Report to the Plenary Assembly of the 1949 Diplomatic Conference, Committee II (Prisoners of War) characterized this Article as one which "clarifies . . . by a limitative enumeration of the categories of work which prisoners [of war] may be required to do." 2A *Final Record* 566. On the contrary, the expression "military character or purpose," used in subparagraphs (b), (c), and (f) of Article 50 are practically indefinable. As to these subparagraphs, the basic problem, as it existed when the words "war operations" were used, remains unchanged. Pictet, *Commentary* 266. In view of the obvious need for authoritative interpretations of the provisions of this article, it would be helpful if sizable groupings of nations, such as NATO and the Warsaw Pact, agreed upon and announced their interpretations of these provisions, as the Nordic Experts did in other areas. Unfortunately, NATO has apparently decided not to standardize procedures relating to the utilization of prisoner-of-war labor. STANAG No. 2044, para. 10.

[53] The difficulties experienced in selecting the appropriate verb to be used in the opening sentence of Article 50 were typical of the overall drafting problem. The following terms were contained in or suggested for the various texts, beginning with the original ICRC draft that was submitted to the 1948 Stockholm Confer-

1. Camp Administration, Installation, or Maintenance

This indirectly authorized category of prisoner-of-war labor refers to the management and operation of the camps established for the prisoners of war themselves; in other words, broadly speaking, it constitutes their own "housekeeping." Early in World War II the United States divided all prisoner-of-war labor into two classes: class one, that related to their own camps; and class two, all other.[54] This distinction still appears to be a valid one. It has been estimated that the use of prisoners of war in the United States for the maintenance and operation of their own camps, and of other military installations,[55] constituted their major utilization.[56] While this is believed to be somewhat of an overstatement, it can certainly be assumed that a very considerable portion of them will always be engaged in the administration, installation, and maintenance of their own camps. However, it can also be assumed that in any future major international armed conflict demands for prisoner-of-war labor will be so great that shortages will exist, requiring that the administration of prisoner-of-war camps be conducted on an extremely austere basis.

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ence and continuing chronologically through the various drafts, amendments, and discussions, until final approval of the article by the Plenary Assembly: "obliged to" (*Draft Revised Conventions* 82–83): "required to" (Revised Draft Conventions 69); "obliged to" (3 *Final Record* 70); "employed on" (2A *Final Record* 272); "engaged in" (*ibid.*, 470); "obliged to" (*ibid.*, 344); "compelled to" (2B *Final Record* 176); and "compelled to" (Article 50 as adopted).

[54] *POW Circular* No. 1, para. 77. Paragraph 78 of the same Circular contained the following informative enumeration:

> 78. Labor in class one is primarily for the benefit of prisoners. It need not be confined to the prisoner of war camp or to the camp area. Class one labor includes:
>
> *a.* That which is necessary for the maintenance or repair of the prisoner of war camp compounds including barracks, roads, walks, sewers, sanitary facilities, water pipes, and fences.
>
> *b.* Labor incident to improving or providing for the comfort or health of prisoners, including work connected with the kitchens, canteens, fuel, garbage disposal, hospitals, and camp dispensaries.
>
> *c.* Work within the respective prisoner companies as cooks, cook's helpers, tailors, cobblers, barbers, clerks, and other persons connected with the interior economy of their companies. In apportioning work, consideration will be given by the company commander to the education, occupation, or profession of the prisoner.

[55] The utilization of prisoner-of-war labor for the operation and maintenance of military installations occupied by the armed forces of the Detaining Power does *not* fall within the classification of camp administration referred to in the Convention. While many such uses would probably come within the category of domestic services (cooks, cook's helpers, waiters, kitchen police, etc.), which are authorized, it appears that many others are no longer permitted. Employment of prisoners of war in the Information Bureau maintained by the Detaining Power is specifically authorized by Article 122.

[56] Fairchild & Grossman 190. *See also*, McKnight, POW Employment 57.

2. Agriculture

This field of prisoner-of-war utilization, with its collateral field of food processing, combined with camp administration to account for the labor of the great majority of employed prisoners of war during World War II.[57] There are no restrictions imposed by Article 50(a) of the 1949 Convention on the employment of prisoners of war in any aspect of agricultural work,[58] the fact that the product of their labor may eventually be used in the manufacture of a military item or be supplied to and consumed by combat troops being too remote to permit, or to warrant, restrictions.[59]

3. Production or Extraction of Raw Materials

This category of compulsory employment, authorized by Article 50(b), includes activities in such industries as mining, logging, quarrying, etc. It is one of the areas in which problems constantly arose during World War II, and in which there were frequent disagreements between belligerents as well as between Detaining Powers and Protecting Powers or humanitarian organizations. Thus, after the conclusion of World War II the ICRC reported that it had been called upon to intervene more frequently with respect to prisoners of war who worked in mines than with respect to any other problem.[60]

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[57] In the spring of 1940 more than 90 percent of the Polish prisoners of war held by the Germans were employed in agriculture; and while that percentage later dropped, it always remained extremely high. Anon., Employment in Germany 317. In the United States, even though more than 50 percent of the man-months worked in industry by prisoners of war were performed in agriculture, the demands for such labor could never be fully met. Lewis & Mewha 125–26. An exception occurred in Canada, where the great majority of the prisoners of war were used in the lumbering industry. Anon., Employment in Canada 337.

[58] Pictet, *Commentary* 266. It is incomprehensible that, despite the experiences of World War II, the enumeration that was originally proposed by the ICRC (*Draft Revised Conventions* 82–83), and was discarded by the 1948 Stockholm Conference (Revised Draft Conventions 69), only to be restored to the Convention by the 1949 Diplomatic Convention at the urging of the United Kingdom delegation (3 *Final Record*, Annex 116, at 70), did not include agriculture as a permitted class. A member of the United States delegation proposed that it be added at the beginning of the list, and his proposal was adopted without discussion or opposition. 2A *Final Record* 470.

[59] An unsuccessful attempt to make this distinction in another context occurred in Vietnam, when the position was taken that herbicides could be used against crops intended for military consumption but not against crops intended for civilian consumption. Bindschedler 36–37. *See also* Levie, Weapons of Warfare 160.

[60] 1 ICRC *Report* 329. For a specific example, see note 21 *supra*. (Unfortunately, few data are available concerning the activities of Protecting Powers in this regard as they rarely publish any details of their wartime activities, even after the concluson of peace. An unofficial report of Swiss activities as a Protecting Power during World War II is contained in Janner, *Puissance protectrice*.) In the *I.G. Farben Case*, 8 TWC at 1187, the Tribunal said:

Inasmuch as the utilization of prisoners of war in this field has been, and continues to be, authorized, the problems which arise usually relate either to the physical ability and aptitude of the particular prisoner of war to participate in heavy, difficult, and specialized labor of this nature, or to working conditions—including safety precautions and equipment—rather than to the fact of the utilization of prisoners of war in the specific industry. The first of these problems has already been discussed[61] and the latter will be discussed in the general analysis of that particular problem.[62]

4. Manufacturing Industries (except Metallurgical, Machinery, and Chemical)[63]

In modern days of total warfare and the total mobilization of the economy of belligerent nations, it has become increasingly impossible to state with any degree of positiveness that any particular industry does not have *some* connection with the war effort. Where the degree of such connection is the criterion for determining the permissibility of the use of prisoners of war in a particular industry, as it was prior to the 1949 Convention, problems and disputes are inevitable. In this respect, by authorizing compulsory prisoner-of-war labor in most manufacturing industries and by specifically prohibiting it in the three categories of industries that will be engaged almost exclusively in war work, Article 50 (b) of the new Convention represents a positive and progressive development in the law of war and has probably eliminated many potential disputes.

During World War II the nature of the item manufactured and, to some extent, its intended ultimate destination determined whether or

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The use of prisoners of war in coal mines in the manner and under the conditions disclosed by this record, we find to be a violation of the regulations of the Geneva Convention and, therefore, a war crime

[61] *See* pp. 218–221 *supra.*

[62] *See* pp. 240–244 *supra.*

[63] The source of some of the wording and punctuation of Article 50(b) is somewhat obscure. As submitted by Committee II (Prisoners of War) to the Plenary Assembly of the 1949 Diplomatic Conference, it read:

. . .manufacturing industries, with the exception of iron and steel, machinery and chemical industries and of public works, and building operations which have a military character or purpose.

2A *Final Record* 576 & 585–86. Although this portion of Article 50 was approved by the Plenary Assembly without amendment (2B *Final Record* 290–98), in the Final Act of the Conference (which is, of course, the official, signed version of the Convention), the same provision reads:

. . .manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no mlitary character or purpose.

1 *Final Record* 254. These changes in wording and puctuation (made in the English version only) represent both a considerable extension and a clarification and should eliminate many disputes which might otherwise have arisen. However, it would be interesting to ascertain just how they came about.

not the use of prisoners of war in its manufacture was permissible. Thus, in the United States it was determined that prisoners of war could be used in the manufacture of truck parts, as these had a civilian, as well as a military, application; but that they could not be used in the manufacture of tank parts, as these had only a military application.[64] Under the 1949 Convention neither the nature, nor the ultimate destination, nor the intended use of the item being manufactured is material. *All* motor vehicles fall within the category of "machinery," and prisoners of war therefore may not be used in their manufacture. On the other hand, prisoners of war may be used in a food-processing plant or in a clothing factory, even though some, or even all, of the food processed or clothing manufactured may be destined for the armed forces of the Detaining Power.

Two sound bases have been advanced for the decision of the 1949 Diplomatic Conference to prohibit in its entirety the compelling of prisoners of war to work in the metallurgical, machinery, and chemical industries: first, that in any general war these three categories of industries will unquestionably be totally mobilized and will be used exclusively for the armaments industry; and second, that factories engaged in these industries will be key objectives of enemy air (and now of enemy rocket and missile) attacks and would therefore subject the prisoners of war to military action from which they are entitled to be isolated.[65] The 1949 Diplomatic Conference apparently balanced this total, industry-wide prohibition of compulsory labor in the three specified industries against the general authorization to use prisoners of war in every other type of manufacturing without requiring the application of any test to determine its relationship to the war effort of the Detaining Power.

It should be borne in mind that the prohibition under discussion is directed only against *compelling* prisoners of war to work in the specified industries. (As we shall see, by inverted phraseology, subparagraphs (b), (c), and (f) of Article 50 also prohibit the Detaining Power from compelling them to do certain other types of work where such work has "military character of purpose.") The question then arises as to whether they may volunteer for employment in the pro-

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[64] Lewis & Mewha 77. After World War II one of the judges of a United States Military Tribunal sitting at Nuremberg held:

> . . .as a matter of law that it is illegal to use prisoners of war in armanent factories and factories engaged in the manufacture of airplanes for use in the war effort.

The *Milch Case*, 2 TWC at 867. The decision in this regard would probably have been otherwise had the defense been able to show that the airplanes were intended exclusively for civilian use. Under Article 50(b) it would be illegal to use prisoners of war on this type of work without regard to the intended use of the airplanes, as they fall within the proscribed category of "machinery."

[65] Pictet, *Commentary* 268–69.

hibited industries. Based upon the discussions at the 1949 Diplomatic Conference,[66] it clearly appears that the prohibitions contained in the various provisions of Article 50 are not, and were not intended to be, absolute in character and that a prisoner of war may volunteer to engage in the prohibited employments, just as he is affirmatively authorized by Article 52 to volunteer for labor which is "of an unhealthy or dangerous nature." The problem will, of course, arise of assuring that the prisoner of war is a true volunteer and that neither mental coercion nor physical force has been used to "persuade" him to volunteer to work in the otherwise prohibited field of labor.[67] However, the fact that this particular problem is difficult of solution (and that the possibility undoubtedly exists that some prisoners of war will be coerced into "volunteering") cannot be permitted to justify an incorrect interpretation of these provisions of the Convention, as to which the indisputable understanding of the 1949 Diplomatic Conference is clearly evidenced in the *travaux préparatoires*.

5. Public Works and Building Operations Which Have No Military Character or Purpose

With respect to this provision of Article 50(b), it is first necessary to determine the meaning to be ascribed to the term "military character or purpose." This is no easy task.[68] Because the term defies defini-

[66] As indicated in note 53 *supra*, the decision to use the words "compelled to" in the first sentence of Article 50 was reached only after the consideration and rejection of numerous alternatives. Words such as "prisoners may only be employed in" were strongly urged because they would preclude the Detaining Power from using pressure to induce prisoners of war to "volunteer" as they still could not be "employed" to do an unlisted class of work (2A *Final Record* 343); and words such as "prisoners of war may be obliged to do only" (or "compelled to do only") were just as strongly urged on the very ground that the alternative proposal would preclude volunteering (*ibid.*, 342). The proponents of the latter position were successful in having their phraseology accepted. *Ibid.*, 344; 2B *Final Record* 176.

[67] The ICRC appears to be inconsistent in asserting that the prohibition against work by prisoners of war in these industries is absolute (Pictet, *Commentary* 268), but that prisoners of war may volunteer to handle stores which are military in character or purpose (*ibid.*, 278), work which the Detaining Power is likewise prohibited from compelling prisoners of war to do. The statement that the absolute prohibition of Article 7 against the voluntary renunciation of rights by prisoners of war was necessary "because it is difficult, if not impossible, to prove the existence of duress or pressure" (*ibid.*, 89) is, of course, equally applicable to all *of* the prohibitions of Article 50 and 52, but the Diplomatic Conference obviously elected to take a calculated risk in this regard insofar as prisoner-of-war labor is concerned.

[68] In his post-Conference article, General Dillon showed considerable restraint when he said mildly that many delegations believed that the phrase "will create some difficulty in future interpretations." Dillon, Genesis 52–53. He had been much more vehement at the Diplomatic Conference. 2A *Final Record* 342–43. As we shall see, the same problems are presented with respect to Article 50(c) (*see* pp. 235–236 and (f) (*see* p. 237).

tion in the ordinary sense of that word, it will be necessary to define by example. Moreover, the discussions which occurred at the 1949 Diplomatic Conference unfortunately provide little that is helpful on this problem.

A structure such as a fortification clearly has, solely and exclusively, a "military character." Conversely, a structure such as a bowling alley clearly has, solely and exclusively, a civilian character. The fortification is intended for use in military operations; hence it has not only a "military character" but also a "military purpose." The bowling alley is intended for exercise and entertainment; hence it does not have a "military purpose," even if some or all of the individuals using it will be members of the armed forces.[69]

These examples have been comparatively black and white—at least insofar as it is possible to have black and white examples in this field. Unfortunately, as is not unusual, there is also a large gray area. This is particularly true of the term "military purpose." A structure will usually be clearly military or clearly civilian in character; but whether its "purpose" is military or civilian will not always be so easy of determination. A sewer is obviously civilian in character; and the fact that it is to connect a military training installation and the municipal sewage disposal plant does not give it a military purpose. On the other hand, a road is likewise civilian in character; but a road leading only from a military airfield to a bomb dump would certainly have a military purpose. Similarly, a theater is civilian in character; but if it is a part of a military training installation and is to be used exclusively, or primarily, for the showing of military training films, then it, too, would have a military purpose. However, a theater which is intended solely for entertainment purposes, like the bowling alley, retains its civilian purpose, even though the audience will be largely military.

To summarize, if the public works or building operations clearly have a military character, prisoners of war may not be compelled to work thereon; if they do not have a military character, but are being undertaken exclusively or primarily for a military use, then they will usually have a military purpose, and, again, prisoners of war may not be compelled to work thereon; while if they do not have a military character and are not being built exclusively or primarily for a military use, then they have neither military character nor purpose, and

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[69] The test is whether it is intended for military use and not whether it is intended for use by the military. A bowling alley or a tennis court or a clubhouse might be intended, perhaps exclusively, for use by the military, but such structures certainly have no military use *per se* and, therefore, they do not have a "military purpose."

prisoners of war may be compelled to work thereon, even though there may be some incidental military use.[70]

Having determined, insofar as it is possible to do so, the meaning of the term "military character or purpose," let us apply it to some of the problems which have heretofore arisen. Although the use of compulsory prisoner-of-war labor in the construction of fortifications had long been considered improper,[71] after World War II a United States Military Tribunal sitting in Nuremberg, found "uncertainty" in the law and held such labor not obviously illegal where it was ordered by superior authority and was not required to be performed in dangerous areas.[72] Under the 1949 Convention such a decision would be clearly untenable. A fortification is military both in character and in purpose and the use of compulsory prisoner-of-war labor in its construction would be prohibited, no matter what the circumstances or location might be. The same is true of other construction of a uniquely military character such as ammunition dumps, firing ranges, tank obstacles, etc. On the other hand, brush clearance and the construction of firebreaks in wooded areas far from the combat zone, the digging of drainage ditches,[73] the building of local air-raid shelters,[74] and the clearing of bomb rubble from city streets[75] are typical of the types of

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[70] The foregoing is substantially the position taken by the United States in U.S. Army *Regs.* 633–50, para. 208b(1), which reads:

> (1) *Military character or purpose.* . . .The term "military character" applies to those items or to those types of construction which are used exclusively by members of the Armed Forces for operational purposes (e.g., arms, helmets, gun emplacements, and confidence courses) as contrasted to items or structures which may be usd by either civilian or military personnel (*e.g.*, food, soap, buildings, public roads, and railroads). The term "military purpose" applies to activities which are intended primarily or exclusively for military operations as contrasted with activities intended primarily or exclusively for other purposes. . . .

It differs from the ICRC position which is that "[e]verything which is commanded and regulated by the military authority is of a military character, in contrast to what is commanded and regulated by the civil authorities." Pictet, *Commentary* 267. However, the latter statement is somewhat leavened by a fairly broad interpretation of the term "military purpose" on the basis that in wartime "anything may have an incidental military purpose" and that "an excessively restrictive interpretation of the letter of the Convention. . .would ultimately lead only to continuing and recurring infringements of the present provision." *Ibid.*, 268.

[71] Flory, *Prisoners of War* 74.

[72] The *High Command Case* (*U.S. v. Von Leeb*), at 11 T.W.C. 534. No such uncertainty existed in the minds of the members of the Tribunal with respect to the use of prisoners of war in the construction of combat-zone field fortifications. *Ibid.*, 538.

[73] Lewis & Mewha 89–90.

[74] *German Regulations* No. 39, para 738.

[75] Pictet, *Commentary* 267–68, where a distinction is justifiably drawn between clearing debris from city streets and clearing it from an important defile used only for military purposes.

public works and building operations which have neither military character nor military purpose.[76]

If the foregoing discussion has added but little light to the problem, it is hoped that it has at least focused attention on an area which can be expected to produce considerable controversy; and here, too, the problem will be further complicated by the question of volunteering.

6. Transportation and Handling of Stores Which Are Not Military in Character or Purpose

Article 31 of the 1929 Convention prohibited the use of prisoners of war in the transport of arms or munitions of any kind, or on the transport of material destined for combatant units."[77] The cognate provisions of Article 50(c) of the 1949 Convention clarify this in some respects and obscure it in others.

The former provision created problems in the determination of the point of time at which material became "destined" for a combatant unit and of the nature of a "combatant unit." These problems have now been eliminated, the ultimate destination of the material transported or handled no longer being decisive. However, creating new difficulties is the fact that the problem of the application of the amorphous term "military in character or purpose" is presented once again. Apparently, a prisoner of war may now be compelled to work in a factory manufacturing military uniforms, or gas masks, or camouflage netting, as these items are neither made by the three prohibited manufacturing industries, nor is their military character or purpose material; but once manufactured, a prisoner of war may not be compelled to load them on a truck or freight car, as they probably have a military character and they certainly have a military purpose. Conversely, prisoners of war may not be compelled to work in a factory making barbed wire, inasmuch as such a factory is in the prohibited metallurgical industry; but they may be compelled to handle and transport it where it is destined for use on farms or ranches, as it would

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[76] *See* U.S. Army *Regs.* 633–50, para. 208b(1)(a).

[77] For clear violations of this provision during World War II by the Germans, *see* Maughan, *Tobruk* 761–62; and by the Japanese, see I.M.T.F.E. 1082–83 and Vizzard, Policy 259, 263. *See also, In re Student.* (Student, a German airborne commander, was charged with responsibility for compelling newly captured British prisoners of war to unload arms and ammunition from German planes during the course of the attack on Crete by German parachutists. He was found guilty by a British Military Court, but the findings and sentence were not confirmed by the convening authority. It is impossible to say whether or not this was because of the acceptance of Student's contention that the temporary detailing of prisoners of war to work in the combat zone is unavoidable in airborne operations. The note of the United Nations War Crimes Commission (4 LRTWC 118) indicates the belief that the act was a clear breach of international law.)

then have neither military character nor purpose.[78] Surely, the 1949 Diplomatic Conference did not knowingly intend any such inconsistent results; but it is difficult to justify any other conclusions logically.

Just as was determined with respect to public works and building operations, it is extremely doubtful that the ultimate intended use of the stores is, alone, sufficient to give them a military character or purpose. Thus, as has been seen, agriculture and food processing are authorized categories of compulsory labor for prisoners of war without any restrictions. The food grown and processed obviously has no military character; and the fact that it will ultimately be consumed by members of the armed forces of the Detaining Power, even in a combat zone, does not give it a military purpose. Accordingly, prisoners of war may be compelled to handle and transport such stores. The same reasoning would apply to blankets and sleeping bags, to tents and tarpaulins, to socks and soap.

In this general category, again, the prohibition is only against compulsion, and prisoners of war who volunteer may be assigned to the work of transporting and handling stores, even though they have a military character or purpose. And, once again, the problem will arise of assuring that these prisoners of war have actually volunteered for the work to which they are assigned.

7. Commercial Business, and Arts and Crafts

It is extremely doubtful whether very many prisoners of war will be given the opportunity to engage in a commercial business, despite the fact that it is specifically listed in Article 50(d), along with arts and crafts. The prisoner-of-war barbers, tailors, shoemakers, cabinetmakers, etc.—all potential commercial entrepreneurs—will usually be required to ply their trades within the prisoner-of-war camp, for the benefit of their fellow prisoners of war as a part of the camp activities and administration. However, it is conceivable that in some locales they might be permitted to set up their own shops or to engage in their trades as employees of civilian shops owned by citizens of the Detaining Power.

That prisoners of war will be permitted to engage in the arts and crafts is much more likely. No prisoner-of-war camp has ever lacked artists, both professional and amateur, who produce paintings, wood carvings, metal objects, etc., that find a ready market, usually through the camp canteen, among the military and civilian population of the Detaining Power.[79] However, normally this category of work will be

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[78] *See* U.S. Army *Regs.* 633–50, para. 208b(1)(b) which states that "[i]f the stores in question are military in character, PW may not be compelled to engage in the transport or handling thereof. If the items are not military in character, then the purpose for which they are to be used is the determining factor."

[79] *See e.g.*, notes II-70 and II-460 *supra*.

done during free time as a remunerative type of hobby, rather than as assigned labor.[80]

8. Domestic Service

The specific inclusion of this category of labor in Article 50(e) merely permits the continuation of a practice that has been rather generally followed and that has rarely caused any difficulty, inasmuch as domestic services have never been construed as having a "direct relation with operations of war," even when such services are rendered to members of the armed forces of the Detaining Power. Prisoners of war have very generally been required to work in laundries and bakeries of the armed forces of the Detaining Power and have been used in their messhalls as cooks, kitchen police, waiters, etc. As long as the domestic services are not required to be performed in an area where the prisoner of war will be exposed to the fire of the combat zone, which is specifically prohibited by the first paragraph of Article 23, the type of establishment in which he is compelled to perform the domestic services, and whether military or civilian, is not material.[81]

9. Public Utility Services Having No Military Character or Purpose

Article 50(f) is the third and final usage of the term "military character or purpose" in connection with prisoner-of-war labor. Its use here is particularly inept, inasmuch as it is difficult to imagine how public utility services such as gas, electricity, water, telephone, telegraph, etc., can under any circumstances be deemed to have a military character.[82] With respect to military purpose, the conclusions previously reached are equally applicable here. If the utility services are intended exclusively, or primarily, for military use,[83] they will have a military purpose and the Detaining Power is prohibited from compelling prisoners of war to work on them. Normally, however, the same public utility services will be used to support both military and civilian activities and personnel and should not be considered as having a military purpose.

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[80] The right of the Detaining Power to assign prisoners of war tc these occupations (commercial business, arts and crafts) is, of course, unrestricted.

[81] Concerning the problem as to whether domestic service is "humiliating," see note 90 *infra*.

[82] In Pictet, *Commentary* 268, the statement is made that these public utility services have a military character "in sectors where they are under military administration." The present author finds it impossible to agree that the nature of the administration of these public utilities should determine their inherent character. If this were so, then public utility services administered by the military authorities in an occupied area, as is normally the case, would be military in character, even though it was originally constructed for, and is then being used almost exclusively by, the civilian population of the occupied territory.

[83] As, for example, where mobile generators are connected solely to military installations or equipment.

10. Limitations with Respect to Unhealthy, Dangerous, or Humiliating Work

Article 52 of the 1949 Convention contains special provisions with respect to labor which is unhealthy, dangerous, or humiliating. These terms are not defined and it may be anticipated that their application will cause some difficulties and controversies. Nevertheless, the importance of these provisions cannot be gainsaid.

Under the first paragraph of Article 52 a prisoner of war may not be *employed on* unhealthy or dangerous work, "unless he be a volunteer." Under the second paragraph of Article 52 a prisoner of war may not be *assigned to* labor which would be considered humiliating for a member of the armed forces of the Detaining Power. No differences can be perceived to have resulted from the use of the verb "employed on" in the first instance and the verb "assigned to" in the second. Accordingly, it is believed that the omission of the clause "unless he be a volunteer" in the case of "humiliating" labor would preclude a Detaining Power from permitting prisoners of war to volunteer for labor which is considered to be humiliating by the members of its own armed forces. (Perhaps the draftsmen believed that there would be no volunteers for work of a humiliating nature and that such a clause would be mere surplusage.)

Article 32 of the 1929 Convention forbade "unhealthy or dangerous work." After World War II this provision was stated to be declaratory of the customary international law of war.[84] In construing this provision, the United States applied three separate criteria: first, the inherent nature of the job (mining, quarrying, logging, etc.); second, the conditions under which it was to be performed (under a tropical sun, in a tropical rain, in a millpond in freezing weather, etc.); and, third, the individual capacity of the prisoner of war.[85] These criteria would be equally relevant in applying the substantially similar provisions of Article 52 of the 1949 Convention.[86]

There are numerous tables of experience factors available for determining whether a particular job is unhealthy or dangerous and is,

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[84] *U.S. v. von Leeb* (the *High Command Case*, 11 TWC 537.)

[85] Lewis & Mewha 112; McKnight, POW Employment 55. The latter continues with the following statement: "The particular task is considered, not the industry as a whole. The specific conditions attending each job are decisive. For example, an otherwise dangerous task may be made safe by the use of a proper appliance, and an otherwise safe job rendered dangerous by the circumstances in which the work is required to be done. Work which is dangerous for the untrained may be safe for those whose training and experience have made them adept in it." (The third criterion mentioned in the text, individual capacity, has already been discussed. *See* pp. 218–221 *supra*.)

[86] In determining whether an industry was of a nature to require special study before prisoners of war were assigned to work in it, the Judge Advocate General of the United States Army rendered the following opinion (SPJGW 1943/10908, 11 August 1943.):

therefore, one upon which prisoners of war may not be employed. Nevertheless, there will very probably be borderline cases in which disputes may well arise as to the utilization of nonvolunteer prisoners of war. However, there will unquestionably be more jobs to be filled in clearly permissible categories than there will be prisoners of war available to fill them. Accordingly, the Detaining Power that is attempting to handle prisoners of war strictly in accordance with the provisions of the Convention can easily avoid disputes in this area by not using prisoners of war on labor of a controversial character.

The last paragraph of Article 52 specifies that "[t]he removal of mines or similar devices shall be considered as dangerous labour." By this simple and unambiguous statement, the 1949 Diplomatic Conference, after one of its most heated and lengthy discussions.[87] made it completely clear that the employment of prisoners of war on mine removal is prohibited unless they are volunteers. The compulsory use of prisoners of war on this type of work was one of the most bothersome problems of prisoner-of-war utilization of World War II, particularly after the termination of hostilities.[88] This problem should not arise in any future major international armed conflict, except in the context of whether or not the prisoners of war so engaged are true volunteers.

The application of the prohibition against the assignment of prisoners of war to work considered humiliating for members of the armed forces of the Detaining Power should cause few difficulties.[89] Certainly, the existence or nonexistence of a custom or rule in this regard in the armed forces of the Detaining Power should rarely be a matter

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. . .If in particular industries the frequency of disabling injuries per million man-hours is:

a. Below 28.0—prisoner-of-war labor is generally available therein;

b. Between 28.0 and 35.0—the industry should be specifically studied, from the point of view of hazard, before assigning prisoner-of-war labor therein;

c. Over 35.0—prisoner-of-war is unavailable, except for the particular work therein which is not dangerous.

It must be borne in mind that, as indicated in the quoted statement, even in an industry in which prisoners of war may be employed, such as one involving the production or extraction of raw materials, a particular industry or a particular job may fall within the ban of being of an "unhealthy or dangerous nature." Fairchild & Grossman 193–94.

[87] For the history and background of this problem and for the debate thereon at the 1949 Diplomatic Conference, see: 1 ICRC *Report* 334; 3 *Final Record* 70–71; 2A *Final Record* 272–73, 443–44, & 345; 2B *Final Record* 290–95 & 298–99; Pictet, *Commentary* 277–78.

[88] 1 ICRC *Report* 333–34.

[89] In Pictet, *Commentary* 277, the following comment appears: "This rule has the advantage of being clear and easy to apply. The reference is to objective rules enforced by that [Detaining] Power and not the personal feelings of any individual member of the armed forces. The essential thing is that the prisoner concerned may not be the laughing-stock of those around him."

of controversy.[90] It is probable that, in the main, problems in this area will arise because the standard adopted is that applied in the armed forces of the Detaining Power rather than that applied in the armed forces of the Power of Origin. While this decision was indubitably the only one which the 1949 Diplomatic Conference could logically have reached, it is not unlikely that prisoners of war will find this difficult to understand and that there will be tasks which they will consider to be humiliating, even though the members of the armed forces of the Detaining Power do not, particularly where the prisoners of war come from a nation having a very high standard of living and are held by a Detaining Power which has a considerably lower living standard.

E. CONDITIONS OF EMPLOYMENT

We have so far considered the two aspects of prisoner-of-war labor that are peculiar to that status: (1) who may be compelled to work; and (2) the fields of work in which they may be employed. Our discussion now enters the areas in which most nations have laws governing the general conditions of employment of their own civilian citizens—laws which, as we shall see, are often made applicable to the employment of prisoners of war.

1. General Working Conditions

The first paragraph of Article 51 of the Convention constitutes a fairly broad code of working conditions. It provides:

> Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work; account shall also be taken of climatic conditions.

These provisions, several of which derive directly from adverse experiences of World War II, are for the most part so elementary as to require little exploratory discussion. However, one major change in basic philosophy is worthy of note. The 1929 Convention provided, in Articles 10 (accommodations) and 11 (food and clothing), that the

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[90] Although prohibitions against the use of prisoners of war on humiliating work were contained in Article 25 of the Declaration of Brussels and in Article 71 of the Oxford Manual, there was no similar provision in the 1899 or 1907 Hague Regulations, nor in the 1929 Convention. Nevertheless, during World War II the United States recognized the prohibition against the employment of prisoners of war on degrading or menial work as a "well settled rule of the customary law of nations" (McKnight, POW Employment 54), and even prohibited their employment as orderlies for other than their own officers. Lewis & Mewha 113. While this latter type of work is prohibited for personnel of the United States Army, it is believed that the prohibition is based upon policy rather than upon the "humiliating" nature of an orderly's functions. Apparently this is settled policy for the United States as the same rule was included in U.S. Army *Regs.* 633-50, para. 209c(2), issued in 1963.

minimum standards for prisoners of war in these areas should be those of "troops at base camps of the Detaining Power."[91] These standards were equally applicable to working prisoners of war. The first paragraph of Article 25 of the 1949 Convention contains an analogous provision with respect to accommodations for prisoners of war generally[92]—but the provisions of the first paragraph of Article 51 quoted above make it abundantly clear that, as to lodging, food, clothing, and equipment of working prisoners of war, the minimum standard is no longer that of base troops of the Detaining Power, but is that of "nationals of the Detaining Power employed in similar work." Moreover, Article 26, which is concerned with prisoner-of-war food generally, contains, in its second paragraph, a specific provision under which working prisoners of war must be supplied "with such additional rations as are necessary for the labor on which they are employed";[93] and Article 27, which is concerned with prisoner-of-war clothing generally, contains, in its second paragraph, a specific provision under which working prisoners of war "shall receive appropriate clothing, whenever the nature of the work demands." While all of these provisions of Articles 25, 26, 27, and 51 of the Convention actually represent a continuation of adherence to local national standards for working prisoners of war, it would appear that the national standards now applicable (civilian nationals in similar work) will be higher than those which were applicable under the 1929 Convention (troops at base camps) inasmuch as workers in many industries are frequently a favored class under wartime conditions.[94]

With regard to a somewhat similar provision contained in the second paragraph of Article 51, less optimism appears to be warranted. This paragraph, making applicable to working prisoners of war "the national legislation concerning the protection of labor and, more par-

[91] *See* pp. 124–131 *supra*

[92] *See* p. 124 *supra*.

[93] *See* p. 129 *supra*. During World War II, prisoners-of-war labor in the Soviet Union was fed "in accord with the output of work." Olson, Soviet Policy 48. If the basic food requirements of Article 26 and 51 are met, there appears to be no prohibition against the issuance of additional items of food as an incentive bonus. The difficulty is that under this system the basic premise rarely exists. Thus, the same author states that in the Soviet Union work quotas were established and "food. . .received was in proportion to quotas filled." *Ibid.*, 46.

[94] It has been asserted that not only must the living conditions of working prisoners of war not be inferior to those of local civilian workers, but also that this provision may not "prevent the application of the other provisions of the Convention if, for instance, the standard of living of citizens of the Detaining Power is lower than the minimum standard required for the maintenance of prisoners of war." Pictet, *Commentary* 271. While the draftsmen of the Convention may well have intended to establish two separate standards in this area, it is difficult to believe that any belligerent will provide prisoners of war with a higher standard of living than that to which its own civilian citizens have been reduced as a result of a rigid war economy.

ticularly, the regulations for the safety of workers," was the result of a proposal made by a delegate of the Soviet Union at the 1949 Diplomatic Conference, which received the immediate support of the United States and others.[95] This support was undoubtedly premised on the assumption that, if adopted, the proposal would increase the protections afforded to working prisoners of war.[96] Second thoughts indicate that this provision may constitute a basis for reducing the protection which it was intended to afford prisoners of war engaged in dangerous employments. The ICRC has deemed it necessary to point out that national standards may not here be applied in such a manner as to reduce the minimum standards established by the Convention.[97] It now appears unfortunate that the Diplomatic Conference adopted the Soviet proposal rather than the suggestion of the representative of the International Labor Organization that it be guided by the internationally accepted standards of safety for workers contained in international labor conventions then already in being.[98] Moreover, the safety laws and regulations are not the only safety measures which are tied to national standards. The third paragraph of Article 51 requires that prisoners of war receive training and protective equipment appropriate to the work in which they are to be employed "similar to those accorded to the nationals of the Detaining Power."[99] This same paragraph likewise provides that prisoners of war "may be submitted to the normal risks run by these civilian workers." Inasmuch as the test as to what are "normal risks" is based upon the national standards of the Detaining Power, this provision, too, would appear to be a potential breeding ground for disagreement and dispute—particularly as the "normal risks" which civilian nationals of the Detaining Power may be called upon to undergo under the pressures of a wartime

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[95] 2A *Final Record* 273–75 & 446–47.

[96] It should be noted that the International Labour Organization proposed an additional article which would have allowed Detaining Powers to employ women prisoners of war only in accordance with the principles applicable for employed women nationals. Diplomatic Conference Documents, Memorandum by the International Labour Organization, Document No. 7, para. 9. This proposal was opposed by the United Kingdom (*ibid.*, Observation 11) and the United States (*ibid.*, Observations 13–14) on the ground that the national standard might be unsatisfactory, or even nonexistent. The proposal was not discussed at the 1949 Diplomatic Conference.

[97] Pictet, *Commentary* 271–72.

[98] 2A *Final Record* 275.

[99] It could be argued that a proper construction of the grammer of this provision makes only the protective equipment, and not the training, subject to national standards. However, this is debatable, and, even if true, it would merely result in the application of an international standard in the very area where the national standard would probably be acceptable.

economy will probably bear little relationship to the risks permitted under normal conditions.[100]

The reference to the climatic conditions under which labor is performed, contained in the first paragraph of Article 51 quoted above, is one of the provisions deriving from the experiences of World War II.[101] The second paragraph of Article 9 of the 1929 Convention provided generally that prisoners of war captured "where the climate is injurious for persons coming from temperate climates, shall be transported, as soon as possible, to a more favorable climate."[102] It is well known that in a large number of cases this was not done. The second paragraph of Article 22 of the 1949 Convention contains a somewhat similar general provision concerning physical transfers; but it was recognized that, despite the best of intentions, belligerents will not always be in a position to arrange for the physical transfer of prisoners of war from the land areas in which they are captured to one with a climate comparable to that of their homeland. Accordingly, the 1949 Diplomatic Conference wrote into the Convention the quoted additional admonition with respect to climatic conditions and prisoner-of-war labor. It follows that, where a Detaining Power cannot (at least for the time being) transport prisoners of war out of an area of an unhealthy climate—whether tropical or arctic—it must, if it desires to utilize the labor of the prisoners of war in that area even temporarily, make due allowances for the climate, giving them proper clothing,[103] the necessary protection from the elements, appropriate working periods, etc.

Article 51 of the 1949 Convention concludes these provisions with a prohibition against the rendering of working conditions more arduous as a disciplinary measure.[104] In other words, the standards for working conditions, be they international or national, established by

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[100] It must be noted, however, that the "normal risks" provision of the third paragraph of Article 51 is specifically made subject to the restrictive provisions of Article 52, concerning which *see* pp. 238–240 *supra*.

[101] The I.M.T.F.E. (at 1002) mentioned "forced labor in tropical heat without protection from the sun" as one of the atrocities committed against prisoners of war by the Japanese. Concerning the violations of international law involved in the construction of the Burma-Siam railroad, see I.M.T.F.E. 1049–57; Bergamini, *Japan's Imperial Conspiracy* 968–69 & 971. The motion picture "The Bridge on the River Kwai" graphically portrayed the problem.

[102] *See* pp. 121–123 *supra*.

[103] Article 27 specifically provides that in issuing clothing to prisoners of war, without regard to the work at which they are employed, the Detaining Power ". . .shall make allowance for the climate of the region where the prisoners are detained." The requirements in this regard of the first paragraph of Article 51 are probably more extensive. Pictet, *Commentary* 271.

[104] Article 89 contains an enumeration of the punishments which may be administered to a prisoner of war as a disciplinary measure for minor violations of applicable rules and regulations.

the Convention, may not be disregarded in the administration of disciplinary punishment to a prisoner of war, and it is completely immaterial whether the act for which he is being punished occurred in connection with, or entirely apart from, his work. Thus, a Detaining Power may not lower safety standards, disregard requirements for protective equipment, lengthen working hours, withhold required extra rations, etc., as punishment for misbehavior. On the other hand, "fatigue details" of not more than two hours a day, or a monetary fine, or the withdrawal of extra privileges, all of which are authorized as disciplinary punishment by Article 89, undoubtedly could be imposed, as they obviously do not fall within the ambit of the prohibition; and the extra rations to which prisoners of war are entitled under Article 26, when they are engaged in heavy manual labor, could undoubtedly be withheld from a prisoner of war who refuses to work, inasmuch as he would no longer meet the requirement for entitlement to such extra rations.

2. Labor Detachments

In the usual arrangement contemplated by the Convention for the utilization of the labor of prisoners of war, each working day the prisoners of war go from their camp to their place of employment, returning to the camp upon the completion of their working period. However, another arrangement is authorized by the Convention—the so-called labor detachment. Thus, where the place at which the work is to be accomplished is too far from any prisoner-of-war camp to permit the daily round trip, a labor detachment may be established. These labor detachments, which were widely used during World War II,[105] are merely miniature prisoner-of-war camps, established in order to meet more conveniently a specific labor requirement. Article 56 of the 1949 Convention requires that they be organized and administered in the same manner as, and as a part of, a prisoner-of-war camp. Prisoners of war making up a labor detachment are entitled to all the rights, privileges, and protections which are available under the Convention to prisoners of war assigned to, and living in, a regular prisoner-of-war camp.[106] However, the fact that local conditions ren-

[105] At the 1949 Diplomatic Conference the representative of the ICRC (Welhelm) stated that experience had indicated that the majority of all prisoners of war were maintained in labor detachments. 2A *Final Record* 276. This is confirmed by the series of articles which appeared in the *International Labour Review* during the course of World War II. *See* Anon., Conditions of Employment 187; Anon., Employment in Germany 318; Anon., Employment in Great Britain 191; McKnight, POW Employment 49; and Anon., Employment in Canada 336.

[106] In addition to the requirements of the second paragraph of Article 56 for the observance of the provisions of the Convention in labor detachments, specific provisions as to these detachments are contained in Article 33(a) (medical services), 35 (spiritual services), and 79 and 81 (prisoners' representatives), among others.

der it impossible to make a labor detachment an exact replica of the prisoner-of-war camp of which it is a satellite does not necessarily indicate a violation of the Convention. As long as the provisions of the Convention are observed with respect to the particular labor detachment, it must be considered to be properly constituted and operated.[107]

One other point with respect to labor detachments is worthy of note. While Article 39 requires that prisoner-of-war camps be under the "immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power,"[108] there is no such requirement as to labor detachments. Although Article 56 provides that each labor detachment is under the authority of the commander of the prisoner-of-war camp to which it is administratively attached, and this camp commander will, of course, be a commissioned officer, there does not appear to be any prohibition against the assignment of a noncommissioned officer as the commander of the labor detachment in place. In view of the large number of labor detachments which will probably be established by each belligerent, it is safe to assume that the great majority of them will be under the immediate command of noncommissioned officers.

A situation under which the utilization of prisoner-of-war labor will usually, although not necessarily, require the establishment of labor detachments is where their services are being used by private individuals or business organizations. This is the method by which most of the many prisoners of war engaged in agriculture (and employed in large private industrial concerns) will probably be administered. During World War II, prisoners of war performing labor under these circumstances were frequently denied the basic living standards guaranteed to them by the provisions of the 1929 Convention.[109] The first paragraph of Article 57 of the 1949 Convention specifically provides not only that the treatment of prisoners of war working for private persons "shall not be inferior to that which is provided for by the present Convention," but also that the Detaining Power, its military authorities, and the commander of the prisoner-of-war camp to which the labor detachment is attached, all continue

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[107] For example, Article 25 requires that billets provided for prisoners of war must be adequately heated. The fact that the parent prisoner-of-war camp has central heating, while the billets occupied by the prisoners of war assigned to a satellite labor detachment have separate, but adequate heating facilities, does not constitute a violation of the Convention.

[108] *See* pp. 163–164 *supra*.

[109] The third paragraph of Article 56 requires the prisoner-of-war camp commander to maintain records of the labor detachments dependent on his camp and to make these available to the Protecting Power and to the ICRC. This is to ensure that there are no "lost" labor detachments, the members of which are completely denied the benefits of the Convention, as occurred during World War II.

to be responsible for their maintenance, care, and treatment;[110] and the second paragraph of Article 57 specifically provides that these prisoners of war have the right to communicate with the prisoners' representative in the prisoner-of-war camp.[111] It remains to be seen whether the changes made in the provisions relating to the maintenance of labor detachments will accomplish their purpose of procuring for prisoners of war in labor detachments the same treatment to which they are entitled in the prisoner-of-war camp itself.[112]

One problem which may arise in the use of prisoner-of-war labor in labor detachments by private persons is that of guarding the prisoners of war. Frequently, the Detaining Power will provide military personnel for this purpose. When it does so, the problems presented are no different from those which arise at the prisoner-of-war camp itself. If paroles have been given to and accepted by the prisoners of war concerned, there are likewise no problems peculiar to the situation.[113] But suppose that civilian guards are used. What authority do they have to compel a prisoner of war to work if he refuses to do so? Or to prevent a prisoner of war from escaping? And to what extent may they use force on a prisoner of war?

If a prisoner of war assigned to work for a private employer refuses to do so, the proper action to take would unquestionably be to notify the military commander of the prisoner-of-war camp to which the labor detachment is attached. The latter is in a position to have

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[110] The unique references to "military authorities" contained in Article 56 and 57 were undoubtedly included in order to make it beyond dispute that, like the camp commander, the appropriate military authorities of the Detaining Power were not relieved from responsibility when the prisoner-of-war labor detachments are maintained by and at the sites selected by the civilian "employer" for whom the members of the detachments are working.

[111] Concerning the prisoners' representative in labor detachments, *see* pp. 298 and 300–301 *infra*. The latter provision cited in the text was included in order to enable the members of the labor detachments to register complaints concerning their treatment should they believe that it is in any respect below Convention standards. Of course, complaints may also be made to the representatives of the Protecting Power, who may visit these labor detachments whenever they so desire (Articles 56 and 126), but these latter are not always readily available, while the prisoners' representatives are. During World War II both the United Kingdom and the United States provided for inspections by their own military authorities of the treatment of prisoners of war who were members of labor detachments working for private persons. Anon., Employment in Great Britain 192; Mason, German Prisoners of War 213.

[112] It should be mentioned that even though prisoners of war may be members of a labor detachment working for a private individual, that is merely a contractual relationship between the Detaining Power and the private individual as a purchaser of labor services. It does not affect the status of the prisoners of war and there is no contractual relationship between the private individual and the prisoners of war. *But see* note II-363 *supra*.

[113] Concerning parole. see pp. 398–402 *infra*.

an independent investigation made and to impose disciplinary punishment or to have charges preferred, as he deems appropriate.

If a prisoner of war assigned to work for a private employer who is not provided with military guards attempts to escape, the authority of the civilian guards is extremely limited. That they may use reasonable force, short of firearms, seems fairly clear. That they may use firearms to prevent escapes is highly questionable.[114] Detaining Powers would be well advised not to assign any prisoner of war to this type of labor, where he is to be completely unguarded or guarded only by civilians, unless the prisoner of war has accepted parole, or unless the Detaining Power has evaluated the likelihood of attempted escape by the particular prisoners of war and has determined to take a calculated risk in their cases.

3. Working Hours, Holidays, and Vacations

Article 53 of the 1949 Convention covers all aspects of the time periods of prisoner-of-war labor. As to the duration of daily work, the first paragraph of Article 53 provides that (1) this must not be excessive; (2) it must not exceed the work hours for civilians in the same district; and (3) travel time to and from the job must be included in the computation of the workday; and the second paragraph of Article 53 provides that (4) a rest of at least one hour (longer, if civilian nationals receive more) must be allowed in the middle of the day.

The prohibition against daily labor which is "excessive" in duration is the same prohibition which had been included in Article 30 of the 1929 Convention. Here again, we have the application of a national standard, and in an area in which such a standard had proved to be disadvantageous to prisoners of war during World War II.[115] The Greek Government had proposed the establishment of an international standard—a maximum of 8 hours a day for all work except agriculture, where a maximum of 10 hours would have been authorized.[116]

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[114] In Pictet, *Commentary* 296, the argument is made, and with considerable merit, that escape is an act of war and that only military personnel of the Detaining Power are authorized to respond to this act of war with another act of war—the use of weapons against a prisoner of war. This theory finds support in the safequards surrounding the use of weapons against prisoners of war, especially those involved in escapes, found in Article 42 of the Convention. *See* pp. 403–404 *infra*.

[115] 2A *Final Record* 275.

[116] Diplomatic Conference Documents, Memorandum by the Greek Government, Document No. 11, at 9.

This proposal was overwhelmingly rejected.[117] As has already been pointed out with regard to other problems, where a national rather than an international standard has been adopted, very few nations at war could afford to grant to prisoners of war more favorable working conditions than those accorded to their own civilian citizens.[118] With respect to hours of daily work, it must be noted, too, that the limitations contained in the Article cannot be circumvented by the adoption of piecework, or some other task system, in lieu of a stated number of working hours, the third paragraph of Article 53 of the Convention specifically prohibiting the rendering of the length of the working day excessive by the use of this method.[119]

The provision for a midday rest of a minimum of one hour, contained in the second paragraph of Article 53, is new[120] and is subject to the national standard only if the latter is more favorable to the prisoner of war than the international standard established by the Convention. In other words, it may be necessary for the Detaining Power to increase the midday rest period given to prisoners of war if its own civilian workers receive a rest period in excess of one hour, but it may not, under any circumstances, be shortened to less than one hour.

The second paragraph of Article 53 further provides that prisoners

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[117] 2B *Final Record* 300. It is, of course, impossible to identify the specific point at which further work becomes "excessive." It has been suggested that the normal ILO limits of 8 hours a day and 48 hours a week should be applied. Pictet, *Commentary* 280. However, this is exactly what the 1949 Diplomatic Conference refused to approve. During World War II the maximum daily hours of work for prisoners of war in the United States was 10, including travel time. Lewis & Mewha 79.

[118] The 1947 Conference of Government Experts had originally considered setting maximum working hours, but had finally decided against so doing because it would be "discrimination in favor of PW, which would not be acceptable to the civilian population of the DP." 1947 GE Report 176. As stated in Anon., Conditions of Employment 194: "The prisoner [of war] cannot expect better treatment than the civilian workers of the detaining Power. . . .His fate depends upon the extent to which the standards of the country where he is imprisoned have been lowered through the exigencies of the war."

[119] During World War II many Detaining Powers used the piece or taskwork method of controlling prisoner-of-war labor. Pictet, *Commentary* 282; Anon., Employment in Canada 337. (In the United States the piecework system was used, but to control pay rather than work hours. Lewis & Mewha 120–21. As long as the pay does not drop below the minimum prescribed in Article 62, there would appear to be no objection to this procedure.) Even when a Detaining Power was faithfully attempting to comply with the worktime provisions of Article 30 of the 1929 Convention, prisoners of war were sometimes, out of necessity, kept overtime and usually received extra work pay for this. Anon., Conditions of Employment 183. This may present a problem for the future, inasmuch as ultimate settlement of prisoner-of-war accounts are now to be made by the Power of Origin, not by the Detaining Power which benefited from the overtime. *See* p. 205 *supra.*

[120] This is the only provision with respect to daily hours of work which was not contained in almost identical words in Article 30 of the 1929 Convention.

of war shall be entitled to a 24-hour rest every week, preferably on Sunday, "or the day of rest in their country of origin." Except for the quoted phrase, which was added at the request of Israel but which should be of equal importance to the pious Moslem, a similar provision was contained in Article 30 of the 1929 Convention. This provision is not subject to national standards, whether the national standard is more liberal or more restrictive.[121] And finally, Article 53 grants to every prisoner of war who has worked for one year "a rest of eight consecutive days" with pay. This provision is new and is of a nature to create minor problems, as, for example, whether normal days of rest are excluded from the computation of the eight days, what activity is permitted to the prisoner of war during his "vacation," and what he may be required to do during this period. However, despite these administrative problems, the provision should prove a great boon to every individual who undergoes a lengthy period of detention as a prisoner of war.

4. Compensation and Other Monetary Benefits

We have already had occasion to review the problem of "working pay"—the compensation to which a prisoner of war is entitled under the provisions of the 1949 Convention for the work performed by him in his capacity as a prisoner of war.[122] However, there is one other aspect of the compensation problem which it is appropriate to consider at this point—compensation for disabilities sustained by prisoners of war as a result of work-connected accidents or disease. What is the lot of the prisoner of war who is the victim of an industrial accident or contracts an industrial disease and is thereby incapacitated, either temporarily or permanently? Does he receive any type of compensation, and if so, what, when, from whom, and how?

The 1899 and 1907 Hague Regulations were silent on this problem. The multilateral prisoner-of-war agreement negotiated at Copenhagen in 1917, the Final Act of the Conference of Copenhagen, adopted a Russian proposal which placed upon the Detaining Power the same

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[121] Nor was it subject to national standards in Article 30 of the 1929 Convention, but the Germans refused to accord prisoners of war a weekly day of rest on the ground that the civilian population did not receive it. Janner, *Puissance protectrice* 54. German employers devised the system of "shadow gangs," termed the "clearest cases of violations" of the Sunday rest provision that occurred during World War II. 1 ICRC *Report* 329. A small number of German workers would work on Sunday with a large number of prisoners of war—but, while the prisoners of war were compelled to work every Sunday, the German workers rotated and were called to such work only at long intervials. The German military authorities forbade this practice in 1941 (*German Regulations* No. 5, para. 9), but a directive issued in 1944 (*German Regulations* No. 44, para. 822) indicates that a major relaxation of the earlier order had occurred. *See also* Anon., Employment in Germany 323. The Russians, not bound by the 1929 Convention, gave Sunday off in theory but not in practice. Anon., *POW in Russia* 8.

[122] *See* pp. 201–205 *supra*.

responsibility in this regard that it had toward its own citizens; but the 1917 Agreement between Great Britain and Germany provided merely that the Detaining Power should provide the injured prisoner of war with a certificate as to his occupational injury.[123] The procedure adopted at Copenhagen was subsequently incorporated into Article 27 of the 1929 Convention, and in 1940, after some abortive negotiations with the British, Germany enacted a law implementing this procedure.[124] The United States subsequently established this same policy,[125] but the United Kingdom considered that it was required only to furnish the injured prisoner of war all required medical and other care.[126]

Inasmuch as no payments were ever made to injured prisoners of war by the former Detaining Powers after their repatriation,[127] it is not surprising that in redrafting the pertinent provisions in formulating the policies for the 1949 Convention, the procedure specified in the 1929 Convention was replaced with one more nearly resembling that which had been adopted in the 1917 bilateral agreement between Great Britain and Germany.[128] The procedure so established is contained in the overlapping provisions of Articles 54 and 68.[129] When a prisoner of war sustains an injury as a result of a work-connected accident, or incurs an industrial disease, the Detaining Power has the obligation of providing him with all required care—medical, hospital, and general maintenance—during the period of his disability and

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123 Flory, *Prisoners of War* 79–80. The French (and the Swiss) had still a different approach: upon repatriation, prisoners of war who had suffered industrial accidents were to be treated as wounded combatants. Rosenberg, International Law concerning Accidents to War Prisoners Employed by Private Enterprises, 36 *A.J.I.L.* at 295 & 296.

124 Lauterpacht, Problem 373. Lauterpacht labels the negotiations as "elaborate" and as "concerning the relatively trivial question of the interpretation of of Article 27."

125 *POW Circular No. 1*, paras. 91 & 92; McKnight, POW Employment 63. For a postwar decision increasing the rate of disability compensation, see JAGA 1950/2239, 13 July 1950.

126 Lauterpacht, Problem 373 n.2.

127 Lewis & Mewha 156.

128 In the *British Manual* para. 185, note 1, the statement is made that during the World War II negotiations the United Kingdom "considered that its domestic workmen's compensation legislation was too complex and so bound up with the conditions of free civilian workmen as to make it impracticable to apply it to prisoners of war." That position has become no less valid with the passing of the years since the end of that war.

129 This redundancy was discussed at some length at the 1949 Diplomatic Conference, with the Soviet Union taking the position that there was unnecessary duplication and the United Kingdom taking the position that Article 68 added something to Article 54. 2A *Final Record* 550–51. While Article 68 does contain data regarding the contents of the certificate to be furnished by the Detaining Power, there does not appear to be any reason why this could not have been merged into Article 54.

his continuation in the status of a prisoner of war.[130] The only other obligation of the Detaining Power is to provide the prisoner of war with a statement, properly certified, "showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment." Also, a copy of this statement must be sent to the Central Prisoners of War Agency, thus ensuring its permanent availability.

If a prisoner of war desires to make a claim for compensation while still in the prisoner-of-war status, he may do so, but his claim will be addressed to his Power of Origin, not to the Detaining Power. transmittal being through the medium of the Protecting Power.[131] The Convention makes no provision for the procedure to be followed beyond this point, probably for the reason that the problem is then a domestic one, involving solely the relations between the Power of Origin and a member of its own armed forces, which would obviously be inappropriate for inclusion in an international convention. It may well be that, in the long run, the present policy, by transferring ultimate liability to the Power of Origin, will prove of more value to the disabled prisoner of war than the apparently more generous policy contained in the 1929 Convention.[132]

It must be pointed out, however, that in one respect the procedure thus adopted by the 1949 Convention contains an obvious injustice: there is no provision entitling the prisoner of war who suffers a work-connected disability to continue to receive credits for working pay. While it is acceptable, and perhaps even preferable, to place ultimate responsibility on the Power of Origin for compensating the prisoner of war for his industrially caused disability, no reason can be perceived for relieving the Detaining Power not only of this liability, but even of that of the continued payment to the disabled prisoner of war

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[130] Articles 40 and 95 of the Fourth (Civilians) Convention place upon the Detaining Power the responsibility of providing "compensation for occupational accidents and diseases." The variation between these provisions and those of Article 54 of the Prisoner-of-War Convention was noted by the Coordination Committee of the 1949 Diplomatic Conference (2B *Final Record* 149), but Committee II (Prisoners of War) determined that such a provision was not necessary for prisoners of war. 2A *Final Record* 402.

[131] It has been suggested that "since under Article 51, paragraph 2, he [the prisoner of war] is covered by the national legislation [of the Detaining Power] concerning the protection of labour," a prisoner of war disabled in an industrial accident or by an industrial disease would, while still a prisoner of war, be entitled to benefit from local workmen's compensation laws. Pictet, *Commentary* 287. Is is believed that the application of this general provision of the Convention has been restricted in this area by the specific provisions of Article 54 and 68.

[132] *See* Anon., Conditions of Employment 182.

of the pittance which constitutes working pay.[133] The French delegate at the 1949 Diplomatic Conference raised the point and suggested that disabled prisoners of war should receive the Detaining Power's national rate of disability compensation as long as they remained disabled and prisoners of war.[134] Perhaps he was seeking too much—but, in any event, no action was taken on his suggestion and the prisoner of war disabled in an industrial accident or by an industrial disease will be at the mercy of the Detaining Power in this regard.[135]

5. Grievance Procedures

In general, any prisoner of war who believes that the right guaranteed to him by the various provisions of the 1949 Convention are, in any manner whatsoever, being violated in connection with his utilization as a source of labor, would have the right to avail himself of any of the channels of complaint established by the Convention: the representatives of the Protecting Power, the prisoners' representative, or, perhaps, the representatives of the International Committee of the Red Cross.[136] Nevertheless, the 1949 Diplomatic Conference felt it advisable to include in the second paragraph of Article 50, following the listing of the classes of authorized labor, a specific provision permitting prisoners of war to exercise their right of complaint should they consider that a particular work assignment is in a prohibited area.[137] It is somewhat difficult to perceive the necessity for this provision, or that it adds anything to the general protection otherwise accorded to the prisoner of war by the appropriate provisions of the Convention. In fact, the danger always exists that by specific provisions such as this the draftsmen may have unwittingly diluted the effect of the general protective provisions of this nature in areas where no specific provisions have been included.

6. Special Agreements

It would not be appropriate to leave the discussion of the utilization of prisoner-of-war labor without at least passing reference to the possibility of special agreements in this field between the opposing belligerents. Strangely enough, despite the fact that prisoner-of-war labor has been the subject of many special agreements, or of attempts to

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[133] During World War II the United States paid prisoners of war injured in industrial accidents one-half (40 cents) of the regular work payments during the period of disability. Tollefson, Enemy Prisoners of War 61; Rich, Brief History 433.

[134] 2A *Final Record* 275–76.

[135] It should be noted that under Article 114 prisoners of war who are injured in accidents are eligible for early repatriation under the provisions of Article 109–117, inclusive, of the Convention. *See* p. 412 *infra*.

[136] For a discussion of complaints by prisoners of war, *see* pp. 285 and 301–302 *infra*.

[137] For examples of prisoner-of-war complaints on this subject during World War II, *see* text in connection with note II-275 *supra*.

negotiate special agreements, between opposing belligerents during both World War I and World War II,[138] and despite numerous specific references elsewhere in the 1949 Convention to the possibility of special agreements, nowhere in the articles of the 1949 Convention concerned with prisoner-of-war labor is there any reference made to this subject. Nevertheless, such agreements, provided they do not adversely affect the rights elsewhere in the Convention guaranteed to prisoners of war, may be negotiated under the provisions of the first paragraph of Article 6 of the Convention, as well as under the inherent sovereign powers of the belligerents.[139]

F. CONCLUSIONS

Utilization of prisoner-of-war labor means increased availability of manpower and a reduction in disciplinary problems for the Detaining Power, and an active occupation, better health and morale, and, perhaps, additional purchasing power for the prisoners of war. It is obvious that both sides have much to gain if all of the belligerents comply with the labor provisions of the 1949 Convention.

On the whole, it is believed that these labor provisions represent an improvement in the protection to be accorded prisoners of war in any future major international armed conflict. True, they contain ambiguities and compromises which can serve any belligerent which is so minded as a basis for justifying the establishment of policies which are contrary to the best interests of the prisoners of war detained by it and which are probably contrary to the intent of the drafters. However, if the Convention is to be at all meaningful, it is necessary to start from the premise that the nations which are Parties to it will, to the maximum extent of their capabilities, implement it as the humanitarian charter which it was intended to be. And in any event, two factors are always present which tend to call forth this type of implementation: the presence of the Protecting Power and the doctrine of reciprocity.[140] Information as to the manner of interpreting and implementing the provisions of the Convention by a belligerent is made known to the other side through the activities of the Protecting Power and thus can become public knowledge, with the resulting effect, good or bad, on world public opinion.[141] Policies which, while perhaps complying with a strict interpretation of the provisions of the Conven-

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[138] *See, e.g.*, the World War I agreements listed in note I-39 *supra;* and the World War II agreements discussed in Lauterpacht, Problem 373.

[139] Concerning special agreements between belligerents, *see* pp. 84–86 *supra.* By becoming Parties to the Convention they have given up their sovereign right to enter into special agreements adversely affecting the rights guaranteed to prisoners of war by the Convention.

[140] The activities of humanitarian organizations such as the ICRC are likewise a major deterrent to the improper application of the Convention.

[141] Concerning the effect of world public opinion, *see* p. 33 *supra.*

tion, are obviously overly restrictive in an area where a more humanitarian attitude appears justified, and could easily be employed, will undoubtedly result in the adoption of an equally or even more restrictive policy by the opposing belligerent. Such retorsion can easily lead to charges of reprisals, which are outlawed, and thus create a situation which, whether or not justified, can result only in harm to all of the prisoners of war held by both sides. While there were nations which, during World War II, appeared to be disinterested in the effect that their treatment of prisoners of war was having on the treatment being received by their own personnel detained by the enemy, it is to be hoped that in any future international armed conflict, even one which represents the ". . . destruction of an ideology . . .,"[142] at the very least, concern for the fate of its own personnel will cause each belligerent to comply fully with the labor provisions of the 1949 Convention.

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[142] Statement of German General Keitel, quoted in *I.M.T.* 475.

CHAPTER IV

PROTECTIVE AGENCIES

A. INTRODUCTORY

Prisoners of war have always been, and continue to be, at the complete mercy of the Detaining Power. The rules which have evolved with respect to prisoners of war have uniformly had the objective of affording them protection against the all-powerful Detaining Power; but rules for the protection of prisoners of war are of value only if there are methods of ensuring compliance therewith.[1] Over the years a number of institutions have come into existence for the accomplishment of this purpose, including: (1) the Protecting Power; (2) the prisoners' representative; (3) the International Committee of the Red Cross; and (4) other international humanitarian organizations. While some of these institutions have other functions, a major function of each, and the one which will concern us here, is to ensure that the prisoners of war receive the full protection accorded to them by the Convention. We shall endeavor to ascertain the nature of each of these institutions, the powers that have been allocated to them, and the manner in which those powers are exercised.

B. THE PROTECTING POWER[2]

1. Historical

The earliest indication of what we now term the Protecting Power probably appeared in the Capitulations of the Ottoman Empire of

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[1] We have already discussed the problem of compliance in the broad sense—the acceptance of the applicability of the Convention generally in the international armed conflict in which a Power is engaged. *See* pp. 26–34 *supra*. Here, we are concerned with ensuring compliance with the specifics of the Convention.

[2] A *Protecting Power* is a State which has accepted the responsibility of protecting the interests of a second State in the territory of a third, with which, for some reason, such as war, the second State does not maintain diplomatic relations. 1973 Draft Additional Protocol, Article 2(d), at 3; Article 2(c), 1977 Protocol I; Siordet, Scrutiny 3. All three States must agree before the Protecting Power may serve as such. Heckenroth, Puissances protectrices 27–31, & 64; Draper, Implementation 46–47. In the terminology which we are using here, the second State is the Power of Origin and the third State is the Detaining Power. If the Protecting Power is acting as such when no state of war exists, the State in whose territory it is acting is more properly called the Power of Residence. (After the break-off of diplomatic relations between the United States and Cuba in 1961, Switzerland acted as the Protecting Power for the United States in Cuba and Czechoslovakia acted as the Protecting Power for Cuba in the United States.)

the sixteenth century.[3] Curiously, in those early days protection of nonnationals came about not as a result of agreements reached with the Power of Residence by the Power of Origin, but as a result of agreements reached with the Power of Residence by the prospective Protecting Power itself—the latter having probably been primarily concerned with the resulting increase in its own prestige and influence in the territory in which it was acting and in the home territories of the protected persons. At that period the Protecting Power was, and in the three succeeding centuries it remained, completely a creature of custom and usage, with no conventional basis, definition, or functions. As a result, the extent of the activity of Protecting Powers varied in different countries and even, with respect to different Protecting Powers, within the same country. The passage of time resulted in the passing of the initiative for the designation of a Protecting Power in a particular case from the Protecting Power to the Power of Origin, where it more properly belonged. It also resulted in the concept of the Protecting Power as an international institution becoming more and more firmly entrenched in customary international law and practice. In its present form, however, the Protecting Power dates back only one century—and its codified form is of even more recent vintage.

Most writers attribute the modern genesis of the Protecting Power to developments which occurred during the Franco-Prussian War (1870–71). In that conflict, probably for the first time, all of the belligerents were represented by Protecting Powers in the territory of the enemy. Great Britain was charged with the protection of the French in Germany; and the United States, Russia, and Switzerland acted as Protecting Powers in France for the various German States.[4] It may be said that the expansion of the functions of the Protecting Power during this conflict was, in large measure, due to two practices which originated during its course: that of expelling enemy consuls; and that of imposing stringent restrictions on enemy aliens.[5] Un-

[3] Isolated instances of this practice had occurred earlier. Thus, for example, we find that in the thirteenth century the Venetian Resident in Constantinople was charged with the protection of Armenians and Jews. The appearance of the Protecting Power has been attributed to a combination of three older institutions of international law: extraterritoriality; the employment of foreigners as diplomatic and consular agents; and the use of personal good offices. Franklin, *Protection* 7–29. It is doubtful that the concept of the Protecting Power as it first appeared in the Turkish Capitulations had any more direct progenitor.

[4] Franklin, *Protection* 29 & 39. Eroglu, La repreésentation 10–12. Detailed information concerning the designation of Protecting Powers in most of the conflicts mentioned herein may be found in this excellent study, at 10–29. (Concerning the older institution of the "Prisoner-of-War Agent," *see* Article III of the *Cartel for the Exchange of Prisoners of War between Great Britain and the United States* (1813) and Basdevant, Deux conventions 5–6.)

[5] Franklin, *Protection* 29.

questionably, each of these practices could and did contribute to the need for the enlargement of the functions of the Protecting Power.

The precedents established during the Franco-Prussian War were adhered to in most subsequent international armed conflicts, many of which had, however, their own peculiar aspects. Thus, in the Sino-Japanese War (1894–95) each side requested the United States to act as its Protecting Power, and so we find the same State acting as the Protecting Power for each belligerent within the territory of the other.[6] Similarly, Germany acted as the Protecting Power for both belligerents in the Italo-Turkish War (1911–12) and in the Sino-Soviet War (1929). Going to the other extreme, in the Greco-Turkish War (1897), Germany acted as the Protecting Power for Turkey in Greece, while three other nations—England, France, and Russia—acted jointly for Greece in Turkey; in the Spanish-American War (1898), England acted as the Protecting Power for the United States, while France and Austria-Hungary acted jointly for Spain [it was during this conflict that, for the first time recorded, a belligerent, (the United States) specifically requested neutral inspection of installations within which prisoners of war were being held[7]]; and during the Balkan Wars (1912-13) France and Russia acted jointly as the Protecting Power for Montenegro. This practice of using more than one neutral State as a Protecting Power has since almost disappeared, although at one time during World War II Spain was acting as the Protecting Power for Japan in the continental United States, while Sweden acted for her in Hawaii, and Switzerland in American Samoa.[8]

The Boer War (1899–1902) may, perhaps, be considered to have been (at least to some extent) an exception to what was fast becoming a firmly established institution of international law. Early in that conflict the British requested the United States to represent their interests with the Boers. Apparently the consent of the Boers was not sought and they not only failed to designate a Protecting Power of their own, but, for all practical purposes, at first refused to recognize the right of the United States consular representatives to act on behalf of the British. Subsequently, the Boers did agree to permit the United States consuls in their territory to perform certain specific and limited functions with respect to British prisoners of war, upon the understanding that United States consuls in Great Britain would, and would be permitted to, perform similar functions with respect

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[6] For the very interesting instructions issued by the United States to its Consul in Peking, *see* [1894]1 *For. Rel. U.S.* 106–08 (1895).

[7] Flory, *Prisoners of War* 107–08.

[8] Franklin, *Protection* 164.

to Boer prisoners of war held there.[9] Thus, to a limited degree, the institution of the Protecting Power was recognized even in that conflict.

The Russo-Japanese War (1904–05) found the Protecting Powers once again exercising the full powers which it had become customary to assign them. Perhaps as a result of the favorable experiences of the Sino-Japanese War, immediately upon the outbreak of hostilities Japan requested the United States to act on its behalf in Russia; while France was designated by Russia as its Protecting Power in Japan and Korea. And once again, but to an even greater extent than during the Spanish-American War, we find the representatives of the Protecting Powers concerning themselves with the welfare of prisoners of war.[10]

Thus it can readily be seen that when World War I burst upon Europe, the designation of Protecting Powers by belligerents was a firmly established international custom, although the Protecting Power as an institution had yet to be the subject of international legislation.[11] During the course of that conflict, four definite items of progress occurred: first, public opinion in the belligerent nations achieved an ability to understand how a friendly neutral could represent, at times vigorously, an enemy belligerent and its nationals;[12] second, the use of the Protecting Power as a means of safeguarding the welfare of prisoners of war, although at first somewhat restricted, was later greatly extended and received rather general acceptance;[13] third, the

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[9] *Ibid.*, 68–70.

[10] Eroglu, La représentation 23–25; Franklin, *Protection* 78–19. The latter states that on one occasion when an American Vice Consul was inspecting a prisoner-of-war camp he was permitted to sample the meal which was then being given to Japanese prisoners of war. In view of all these precedents, it is particularly difficult to comprehend why the 1899 and 1907 Hague Conferences, both of which were sponsored by the Tsar of Russia, while codifying many customary rules concerning the treatment of prisoners of war, continued the silence of previous international conventions with respect to the institution of the Protecting Power.

[11] Franklin, *Protection* 94–95. For the instructions issued by United States Secretary of State Bryan in August 1914, *see* 9 *A.J.I.L* Supp. 118 (1915); [1914] *For. Rel. U.S.* Supp 740–41 (1928).

[12] *See* Siordet, Scrutiny 7. World War I saw more men taken prisoner of war than in any previous conflict; and it likewise saw them held in captivity for longer periods of time. Both of these factors had the effect of focusing attention on prisoners of war. It was undoubtedly this situation which led to the more general acceptance of the idea of a wider use of Protecting Powers in the interests of prisoners of war. Pictet, *Commentary* 93–94.

[13] Strangely, Germany, which had frequently acted as a Protecting Power, and the United States, which had not only frequently acted as a Protecting Power, but was probably the protagonist of the extension of the functions of the Protecting Power with respect to prisoners of war prior to its own entry into World War I, were the two most important belligerents to resist the activities of Protecting Powers. At the beginning of that War, Germany instituted rigid restrictions on

practice was adopted that when a neutral which had been acting as a Protecting Power itself became embroiled in the conflict, a successor Protecting Power would be designated to fill the vacuum;[14] and, finally, the Protecting Power received legal recognition as an international institution in a number of bilateral and multilateral agreements entered into by various of the belligerents during the course of the hostilities in which, to a surprising extent, its functions were spelled out with some degree of definiteness.[15]

The precedents established during World War I were destined to bear fruit.[16] A draft prisoner-of-war convention prepared in 1921 by the ICRC, while contemplating the use of Protecting Powers for certain limited purposes, would have assigned to the ICRC the responsibility for establishing mobile commissions composed of neutrals charged with assuring that the belligerents were complying with the convention. This proposal was probably due to two factors: first, the failure of the States which had acted as Protecting Powers during World War I adequately to report their activities; and, second, the belief that the duties involved in the effective protection of the rights of prisoners of war exceeded the capacity of the diplomatic personnel of the Protecting Powers.[17] However, when the Diplomatic Conference convened in Geneva in 1929 and drafted the convention which subsequently received the ratifications of the vast majority of States, the ICRC proposal was not adopted; instead, the basic principle of the Protecting Power received general acceptance, the former Protecting Powers taking the position that all that was needed to assure their activities was that their role "should be distinctly set out, and their task clearly defined."[18] The 1929 Prisoner-of-War Convention

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visits by neutrals to its prisoner-of-war camps. By 1916 these restrictions had, due largely to the efforts of the United States, for the most part disappeared. Yet when the United States became a belligerent in 1917, the United States Secretary of War took the position that Germany had no right to designate the Swiss to inspect American prisoner-of-war camps unless under treaty law. Flory, *Prisoners of War* 108–09. His position was apparently overruled by President Wilson and the Swiss were permitted to make such inspections.

[14] Eroglu, La représentation 27–28.

[15] All of the bilateral and multilateral agreements cited in note I-39 *supra* had references to the Protecting Power. The 1918 Agreement between the United States and Germany cited therein referred to the Protecting Power in no less than 25 separate articles.

[16] Franklin, *Protection* 99–100, states, or perhaps somewhat overstates, that a plan for the operations of the Protecting Power proposed by the still-neutral United States in 1915, and accepted by the British and German Governments with broadening modifications, "gained world-wide recognition and paved the way which led to the prisoner of war convention signed . . . at Geneva on July 27, 1929."

[17] Rasmussen, *Code des prisonniers de guerre* 56.

[18] Siordet, Scrutiny 12. Twenty years and one World War later, we again find them urging that the Protecting Power be given the benefit of "well-defined and precise provisions." 2B *Final Record* 19.

thus became the first international agreement negotiated in time of peace to give official recognition to the institution of the Protecting Power.[19] However, it did not create a new international concept. It did not make the use of the Protecting Power by belligerents obligatory. It did not affect the relationships which had previously existed between the Power of Origin, the Protecting Power, and the Detaining Power. It did give the relationship a formal and agreed status which it had not previously had.[20] It may well be considered that the provisions of the 1929 Convention relating to Protecting Powers constituted the most important advance contained in that Convention over the provisions relating to prisoners of war contained in the 1907 Hague Regulations. The lessons learned during World War I had not been forgotten.

The advent of World War II provided, all too soon, an opportunity for the implementation and testing of this novel international legislation. Most of the belligerents were represented by Protecting Powers and, in general, these found the provisions of the 1929 Convention relating to their activities extremely helpful, even if not as all-inclusive as they might have preferred. True, the designation and functioning of Protecting Powers on behalf of prisoners of war had previously become an almost universally accepted custom of the international law of war. But it is necessary to bear in mind that, despite this, in the Soviet Union and in Japan, neither of which nations was a party to the 1929 Convention, there was either complete or substantial failure in the functioning of the Protecting Powers.[21]

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[19] Seitz, La Suisse 34.

[20] Franklin, *Protection* 115; Janner, *Puissance protectrice* 49.

[21] The Soviet Union took the position that as it was a Party to the Fourth Hague Convention of 1907, the Regulations annexed to which, it asserted, covered "all the main questions of the regime of captivity" (but not the question of the Protecting Power, see note 10 *supra*), there was no need for it to consider an Italian proposal to apply reciprocally the provisions of the 1929 Convention (1 ICRC *Report* 412). While Japan stated its intention to "apply this Convention *mutatis mutandis*, to all prisoners of war" (*ibid.*, 443), the Protecting Powers were never permitted to function in Japan in a manner even remotely resembling their manner of functioning in the territories and, particularly, the occupied territories of most of the other belligerents. *I.M.T.F.E.* 1127–36; Franklin, *Protection* 129–34. As a result of the foregoing, and of the disappearance of many Powers of Origin during the course of the hostilities, the ICRC has estimated that during World War II approximately 70 percent of all prisoners of war were deprived of the services of a Protecting Power. 2B *Final Record* 21; de La Pradelle, *Nouvelles conventions* 226. Thus, Germany denied the status of States to Poland, Yugoslavia, France, and Belgium (after the 1940 armistice agreements), Free France and Italy (after Mussolini's overthrow in 1943), and refused to permit the intervention of Protecting Powers on behalf of their captured personnel. Pictet, *Recueil* 87–88. After World War II ended, the Swiss made a detailed report of their manifold activities as a Protecting Power. Seitz, La Suisse 34.

In general, the fact that such a large number of countries were parties to the World War II hostilities had two distinct but related results. In the first place, not only did the absence of strong neutrals present a problem in the selection of Protecting Powers, but it also meant that there was no large neutral world public opinion to be affected by violations of the Convention; and, in the second place, because of the small number of neutrals available to act as Protecting Powers, it frequently occurred that the same neutral was designated to act as the Protecting Power for two opposing belligerents.

Once again wartime lessons were not forgotten and, just four years later, the 1949 Prisoner-of-War Convention was signed in which, as we shall see, the functions of the Protecting Power are identified and defined with far greater particularity than had been the case in the 1929 Convention.[22] Unfortunately, in not one of the numerous instances of international armed conflicts which have occurred since 1949 has the institution of the Protecting Power been utilized.[23]

From the foregoing brief historical survey, it is apparent that prior to 1870 only the precursors of the modern Protecting Power existed, and not the latter itself; that during the period from 1870 to 1914 the concept of the use of the Protecting Power began to take form, particularly with respect to the problem of the prisoner of war; and that, during the period subsequent to 1914, the form has become definite, the institution of the Protecting Power having become the subject of numerous bilateral and multilateral international agreements, culminating in the 1949 Convention to which most of the nations of the world are parties.[24] It now becomes appropriate to an-

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[22] References to the Protecting Power are contained in 36 of its 132 substantive articles, as well as in two of its Annexes.

[23] U.N., *Human Rights*, A/7720, sec. 213. *But see* Pictet, *Humanitarian Law* 66 and note 29 *infra*. In Korea and in Vietnam the ICRC performed the humanitarian functions of the Protecting Power on one side (in South Korea and in South Vietnam) but was not allowed to do so on the other. In the Indo-Pakistani Wars (1965 and 1971), the Middle East Wars (1967 and 1973), and the Honduran-Salvador Conflict (1969), the ICRC performed these functions on both sides. (In the India-Portugal War (1961) a Protecting Power already existed because of a prior break in diplomatic relations.)

[24] *See* Appendix B. The use of the institution of the Protecting Power has since been resorted to in Article 21 of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, where it is adopted as a means of overseeing the protection of inanimate objects—which is, actually, merely a variation of the protection furnished historically by a Protecting Power, a very large part of its energy having once been directed toward the protection of the embassy buildings and diplomatic archives of the Protected Power. *See also*, Articles 45 and 46 of the 1961 *Vienna Convention on Diplomatic Relations*.

alyze the form and the character which the Protecting Power received during this evolutionary process.[25]

2. The Modern Concept of the Protecting Power

a. DESIGNATION

Article 86 of the 1929 Convention was, to say the least, somewhat vaguely worded:

> The High Contracting Parties *recognize* that the regular application of the present Convention will find a guaranty in the *possibility* of collaboration of the protecting Powers charged with safeguarding the interests of belligerents. . . . (Emphasis added.)

There is nothing mandatory here. There is no requirement here that a Protecting Power actually be designated or that, if designated, it be permitted to function as such by the Detaining Power. The comparable provision of the 1949 Convention reads quite differently. Article 8(1) of the latter Convention reads:

> The present Convention *shall be applied with the cooperation and under the scrutiny* of the Protecting Powers *whose duty* it is to safeguard the interests of the Parties to the conflict. . . . (Emphasis added.)[26]

It would appear that it was intended that the designation of Protecting Powers become at least a moral obligation of the belligerents; and that, once designated, a Protecting Power has a duty not only to the Power of Origin[27] but also to the other parties to the conflict,

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[25] As was aptly stated by one author: "What happened was that an existing usage was taken, and transformed into a regulation. It was the organ which created the function." Siordet, Scrutiny 3.

[26] This provision has been termed "the keystone" of the 1949 Convention. Yingling & Ginnane 397. In the *British Manual* para. 276, the Protecting Power is termed "the principal organ, apart from the Contracting Parties themselves, for ensuring the observance of the execution of the Convention." It is therefore indeed distressing to find that while Soviet International Law states (at 421) that "citizens of a belligerent who remain on enemy territory are under the protection of some neutral country," nowhere in the comparatively detailed discussion of the 1949 Prisoner-of-War Convention (at 431–34) is there even any passing reference to such a right of protection for prisoners of war or to the provisions of the Convention relating to Protecting Powers.

[27] It must be borne in mind that a Protecting Power is not a general agent of the Power of Origin. One author has defined the overall relationship between these two Powers as follows: "The protecting Power does not act in its own name but rather as a kind of caretaker or *intermediary*. Nevertheless, it acts *independently* in so far as the State whose interest it protects cannot demand, but only request, it to perform certain services, and the protecting Power itself decides the way in which it discharges its mission. Nor may a belligerent give instructions to those organs of the protecting Power which carry out this mission. Instead, requests to the protecting Power have to be made through *diplomatic channels*. The protecting

to perform the functions which have been assigned to it by the Convention.[28] But if it was the intention of the 1949 Diplomatic Conference to make the designation of Protecting Powers mandatory in international armed conflicts, the Convention has been totally unsuccessful in accomplishing that purpose; for, as has been mentioned, there has not been a single Protecting Power designated pursuant to Article 8 since the Convention was drafted and entered into effect —and there has certainly been no lack of international armed conflict during that period. The importance of this failure cannot be overestimated.[29]

The ICRC has identified three major reasons why the institution of the Protecting Power has not been utilized in the international armed conflicts which have taken place since the Convention became effective:

(1) The designation of a Protecting Power might be interpreted as the recognition of the enemy belligerent;

(2) Despite the armed conflict, diplomatic relations were not broken off by the belligerents;

(3) The existence of a general reluctance, because of the provisions of Article 2(4) of the Charter of the United Nations, to admit the existence of and participation in international armed conflict.[30]

It is possible to draft provisions which would effectively eliminate the first two bases for failing to designate a Protecting Power. It would be exceedingly difficult, if not impossible, to draft a provision which would eliminate the third reason.

Power may refuse to act when compliance with a request would be contrary to its own interests or infringe the lawful right of the enemy State." Castrén 92. *See also*, Franklin, *Protection* 114.

[28] Siordet has stated that the designation of a Protecting Power is no longer optional but is now "almost obligatory"; that it is now put in the "imperative form"; and that in performing its mission the Protecting Power is no longer the special representative of one of the parties, but is "the representative of all the Contracting Parties to the Convention." Siordet, Scrutiny 36. *See also*, 1971 GE Documentation, II, at 11–12.

[29] In Pictet, *Humanitarian Law* 66, the statement is made that Protecting Powers have been designated in three instances since World War II: Suez (1956); Goa (1961); and Bangladesh (1971). Forsythe, Who Guards the Guardians 46–47 accepts that statement in its entirety. However, it is subject to major qualifications; in fact, it is arguable that none of these three instances can really be said to constitute the designation of a Protecting Power pursuant to Article 8 of the 1949 Convention.

One of the leading military-academic scholars in this field has said: "To talk of the regular application of international humanitarian law without the effective functioning of some Protecting Power system . . . is idle chatter." Draper, Implementation 47. Elsewhere the same author has said that "the Geneva Conventions of 1949 are virtually inoperative without the active role and participation of the Protecting Power system." *Ibid.*, 46.

[30] 1971 GE Documentation, II, at 16–17. For a lengthier list of reasons, *see* Abi-

The future is far from bright with respect to the overall solution of this problem, and this has received wide recognition. Area specialists are able to find little or no evidence that any Communist country —given the "spy-phobia" complexes with which all are afflicted— will ever allow a Protecting Power to function in its territory,[31] no matter how the provisions of the Convention relating to the designation of Protecting Powers are strengthened and clearly made mandatory. Some time ago the United Nations General Assembly, after shying away from the subject for many years, officially recognized the prior lack of, and the future need for, recourse to the institution of the Protecting Power.[32] Innumerable private international organizations have sought a solution to the problem.[33] At the very initiation of its proposal to review the need for the reaffirmation and development of international humanitarian law applicable in armed conflicts, the ICRC emphasized the problem in this area,[34] and the Conference of Government Experts convened by the ICRC in 1971 discussed the subject at great length.[35] The ICRC attempted to draft a provision which would not only make the designation of a Protecting Power practically mandatory, but would also eliminate several of the reasons, enumerated above, for the past failures to designate Protecting Powers.[36] The 1972 Conference of Government Experts once again discussed the matter at length,[37] this time in the context of the ICRC proposal and of the many substitute and amendatory proposals

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Saab, Le renforcement du système du droit humanitaire, XII/2 *Revue de droit pénal militaire et de droit de la guerre* 227–28.

[31] Miller, *The Law of War* 224, 241–42, & 254. These conclusions are undoubtedly based at least in part on the actions of the Soviet Union during World War II; the events in Korea (1950–53); the Sino-Indian War (1962); and Vietnam (c. 1965–73). Nevertheless, in commenting on the proposals contained in U.N., *Human Rights*, A/8052, Ch. XI, concerning the possibility of new machinery to replace the Protecting Power, the Soviet Union said that "it must be stated that existing institutions should be used to supervise the application of humanitarian rules in armed conflict." U.N., *Human Rights*, A/8313, at 68. The cynic might interpret this to mean that the Soviet Union prefers a moribund, inoperative Protecting Power rather than a new, vital, mandatory institution, created for the purpose of ensuring that belligerents will apply, and will comply with, the provisions of the Convention.

[32] G.A. Res. 2852, 20 December 1971, Respect for human rights in armed conflicts, 26 GAOR, Supp. 29, at 90, U.N. Doc. A/8429 (1972). *See also* U.N., *Human Rights*, A/7720, § 213.

[33] *See* 1971 GE Documentation, II, at 22. *See also* 1972 *I.L.A.* Rep. 305, 308; U.N., *Human Rights*, A/8370, § 165.

[34] 1969 Reaffirmation 87–91; 1971 GE Documentation, II, at 10–34.

[35] 1971 GE Report, paras. 532–51.

[36] 1972 *Basic Texts* 6; 1972 *Commentary* 14–19.

[37] 1972 GE Report, I, at paras. 4.56–4.58, & 5.24.

that had been submitted by the experts of the various nations.[38] Out of this discussion emerged a new proposal that was submitted to the Diplomatic Conference.[39]

Article 5 of the 1973 Draft Additional Protocol relating to international armed conflicts contained six paragraphs, the first five of which are relevant to the problem under discussion. Paragraph 1 provided that from the outset of international armed conflict, as specified in Article 2 of the 1949 Convention, each belligerent "shall without delay designate a Protecting Power . . . and . . . permit the activities of a Protecting Power designated by the adverse Party and accepted as such." Obviously, this was merely an iteration of a fundamental, customary rule of international law and no real solution to the problem. True, the belligerents were being told in grammatically authoritative language (*shall*) that they were to make use of and to permit the enemy to make use of the Protecting Power; but once again there would be no automatic remedy for the situation created where a belligerent disregarded, or even affirmatively refused to comply with, the requirements of the paragraph.[40]

In paragraph 2 an attempt was made to solve the foregoing problem. It provided that where there was "disagreement or unjustified delay" in the designation of Protecting Powers, the ICRC "shall offer its good offices"—not to perform the functions of the Protecting Powers but merely to assist in their selection: it was therein authorized to ask each belligerent for "a list of at least five States which they

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[38] *Ibid.*, II, 97–104 *passim.* For a discussion of the proposal in this regard made by the U.S. experts, see Baxter, Perspective: the Evolving Law of Armed Conflicts. 60 *Mil. L. Rev.* 99, 109–10 (1973).

[39] Article 5 of the 1973 Draft Additional Protocol; and 1973 *Commentary* 11–14. That Article was discussed, amended, and adopted by Committee I of the 1975 Diplomatic Conference. 1975 Report of Committee I, at 10–17; The Committee's proposal was adopted *in toto* by the Diplomatic Conference with only minor editorial changes.

[40] The 1973 Conference of Government Experts had discussed the possibility of a procedure for the automatic designation of Protecting Powers but had decided against it. 1973 *Commentary* 12. The provisions actually adopted by the Diplomatic Conference as Article 5(1) and (2) of the 1977 Protocol I read:

Article 5—Appointment of Protecting Powers and of their substitute

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including *inter alia* the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.

consider acceptable";[41] the lists "shall be communicated" within 10 days; and if any State is on both lists, the ICRC is to seek its agreement.[42] And paragraph 3 included alternative proposals for the consideration of the Diplomatic Conference as to the procedure to be followed if, despite the provisions of paragraph 2, no Protecting Powers were designated: (1) the ICRC could offer to assume the functions of a substitute for the Protecting Powers if the adverse belligerents agreed "and insofar as those functions are compatible with its own activities"; or (2) the belligerents "shall accept" the offer of the ICRC to act as a substitute for the Protecting Powers.[43] The first alternative still made it possible for a belligerent to prevent the ultimate designation of a Protecting Power or a substitute for a Protecting Power; the second alternative made it mandatory that the offer of the ICRC be accepted by the belligerents.

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[41] It was not clear whether a belligerent would be suggesting States which it desired to have act as a Protecting Power on its behalf, or which it would be willing to accept on its territory as a Protecting Power for the adverse Party, or both. However, this has been clarified in Article 5(3) of the 1977 Protocol I. *See* note 42 *infra*.

[42] Presumably, the inclusion of the name of a State on the two lists would mean that it was acceptable to both belligerents and only its consent would then be needed for the trilateral agreement that is required. *See* note 2 *supra*, and note 50 *infra*. The provision actually adopted by the Diplomatic Conference as Article 5(3) reads:

> 3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, *inter alia*, ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.

(The ICRC is not instructed as to what action it is to take if, by chance, more than one State is named on both lists!)

[43] The ICRC had previously announced that it had decided that all of the functions of the Protecting Power were humanitarian in nature and that they could, therefore, be performed by that organization. 1972 GE Report, I, para. 4.71 (at 180). *See also*, *ibid.*, 208; and 1971 GE Report, paras. 553–54. The major controversy in Committee I revolved around the choice between the two alternatives proposed, as well as many suggested variations thereof. Article 5(4) of the 1977 Protocol I, as approved by the Diplomatic Conference, reads:

> 4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the

Paragraph 4 was an attempt to eliminate one of the reasons sometimes advanced by belligerents as justification for their failure to utilize the institution of the Protecting Power in international armed conflict—the fear that this action would be interpreted as a recognition of the enemy belligerent.[44] It very specifically stated that the designation and acceptance of Protecting Powers "shall not affect the legal status of the Parties to the conflict or that of the territories over which they exercise authority."[45] And paragraph 5 was an attempt to eliminate another of the reasons that had previously been advanced by belligerents as justification for their failure to utilize the institution of the Protecting Power in international armed conflict—that diplomatic relations had not been broken off by the belligerents.[46] It provided in relevant part that "[t]he maintenance of diplomatic relations . . . does not constitute an obstacle to the appointment of Protecting Powers . . . ."[47] Experience has demonstrated that even though diplomatic relations have not broken off, an enemy

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said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operation of the substitute in the performance of its tasks under the Conventions and this Protocol .

Concerning the "any other organizations" referred to above, *see* pp. 312–314 *infra*.

[44] The several Middle East conflicts (1956, 1967, 1973) presented this problem. Pilloud, Reservations 8.

[45] See also Article 4 of the 1977 Protocol I. A provision to the same general effect may be found in Article 3(4) of the 1949 Convention, dealing with noninternational armed conflicts, and for the same reason. Article 5(5) of the 1977 Protocol I as approved by the 1975 Diplomatic Conference reads:

5. In accordance with article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and the Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

[46] The major international armed conflict in which diplomatic relations were not broken off and in which this problem arose was the Sino-Indian War (1962). *See* Cohen & Chiu, *People's China* 1570–71; Cohen & Leng, The Sino-Indian Dispute 298–300; Draper, Implementation 46.

[47] Article 5(6) as adopted by the Committee I of the 1975 Diplomatic Conference was the proposed Article 5(5) of the 1973 Draft Additional Protocol with an addition which should make it even more difficult for a belligerent to use the existence of diplomatic relations as an excuse for failing to cooperate in the designation of Protecting Powers. Article 5(6) of the 1977 Protocol I, as approved by the Diplomatic Conference reads:

6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

(For a discussion in depth of the activities of the 1975 session of the Diplomatic Conference with respect to Article 5 of what became the 1977 Protocol I, see Forsythe, Who Guards the Guardians.)

Embassy cannot function for the protection of its nationals, particularly prisoners of war, to an extent even remotely equivalent to a neutral State acting as a Protecting Power.[48]

What are the qualifications required for designation as a Protecting Power? It must, first of all, be a State within the meaning of that term in international law. It must also, of course, be a *neutral* State —and it is advisable that it be one which can reasonably be expected to remain neutral, although this latter qualification has become more and more difficult to assure. And, finally, it must be a State which maintains diplomatic relations with both the requesting State (the Power of Origin) and the State in the territory of which it is being requested to operate (the Detaining Power).

How does a State actually become a Protecting Power? The belligerent State desiring the services of a Protecting Power (the Power of Origin) requests a neutral State which has the qualifications listed above to act on its behalf vis-à-vis a specific enemy belligerent. If the neutral State is willing to assume the functions of a Protecting Power, it so notifies the requesting State. It must then obtain the concurrence of the enemy belligerent in whose territory it has been requested to function (the Detaining Power).[49] In other words, the actual designation of the Protecting Power is based upon the request of the Power of Origin and the consent of both the proposed Protecting Power and the Detaining Power.[50]

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[48] Cohen & Leng, The Sino-Indian Dispute 278 & 320; Draper, People's Republic 367; 1971 GE Report, para. 538. This does not apply to neutrals or cobelligerents and Article 4(2) of the Fourth Convention provides that nationals of such Powers are not protected persons while diplomatic relations are maintained. There is no such provision with respect to nationals of enemy Powers. In the Third Convention the sole reference to the effect of the continuance of diplomatic relations is in that portion of Article 4B(2) which is concerned with members of the armed forces of belligerents in the territory of neutral or "non-belligerent" Powers. This is indicative of the fact that the 1949 Diplomatic Conference did not intend that the continuing presence of enemy diplomatic personnel in the territory of a belligerent should nullify the provisions of the Convention concerning Protecting Powers. The 1972 Conference of Government Experts apparently felt quite strongly about this. 1973 *Commentary* 164; 1972 GE Report, I, paras. 4.56–4.79.

[49] Heckenroth, Puissances protectrices 74. This is the step that the United States apparently failed to take when it was requested to perform the functions of the Protecting Power by Great Britain during the Boer War (1899–1902), *See* p. 257 *supra*.

[50] The 1949 Convention contains no provisions with respect to the method of designating a Protecting Power, the required qualifications for a Protecting Power, etc., leaving these problems to be governed by the relevant rules of customary international law. Heckenroth, Puissances protectrices 62 & 224. The 1973 Draft Additional Protocol proposed, in Article 2(d), to define the term "Protecting Power" as meaning "a State not engaged in the conflict, which, designated by a Party to the conflict and accepted by the adverse Party, is prepared to carry out the functions assigned to a Protecting Power under the Conventions and the pres-

As we have seen, it has frequently occurred in the past that more than one State has been designated as the Protecting Power for a belligerent.[51] There is nothing in the 1949 Convention, nor in general international law, to preclude this practice. However, the advantages of the other extreme—one and the same Protecting Power for opposing belligerents—are many. Even a small nation, when acting as the Protecting Power for both sides, is in a unique position to obtain a general observance of the law of war by each belligerent on the basis of reciprocity. This was made quite apparent during World War II, when Switzerland acted as the Protecting Power for many of the belligerents on both sides of that conflict.[52] The limited number of States that would be available and competent to act as Protecting Powers in any future major international armed conflict might once again bring about this result.[53]

b. SUBSTITUTES FOR PROTECTING POWERS

In the light of events of World War II, the delegates at the 1949 Diplomatic Conference could not but foresee the possibility of situations in which there would be no Protecting Power to stand between the Detaining Power and the prisoner of war.[54] They attempted to

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ent Protocol." This provision, with some useful editing, was eventually approved by the Diplomatic Conference as Article 2(c) of the 1977 Protocol I. It reads:

> (c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol.

[51] *See* pp. 256–257 *supra*.

[52] Pictet, *Commentary* 95–96. The same conclusion was reached in Franklin, *Protection* 164–65, where this statement appears: "For uniformity and simplicity of administration it is obviously desirable for the protected power [Power of Origin] to entrust its interests in another country to only one protecting power, and in instances involving the protection of belligerent interests there are advantages to all concerned if both belligerents entrust their interests in the other's territory to the same protecting power. . . . The experience of World War II indicates that a more uniform administration and a higher standard of treatment of enemy interests by both belligerents result from a reciprocal protection of the interests of those belligerents by the same protecting power throughout the territories under the control of each belligerent." In 1945 Switzerland alone represented 35 belligerents, and in many cases it represented both of opposing belligerents in the territory of the other. Janner, *Puissance protectrice* 24 and Annexe I, at 68–70. (Eroglu, La représentation, Annexe III, at 144–48, lists only 34, but he omits Yugoslavia.)

[53] One author has suggested the possibility that in a future international armed conflict the demand for Protecting Powers may exceed the supply available. De La Pradelle, *Nouvelles conventions* 225. Of course, since that was written the number of States in the world community has more than doubled and many of these new sovereign entities would probably be available to act, and would be fully capable of acting, as Protecting Powers.

[54] For some of these possible situations see Siordet, Scrutiny 48–53; and Heckenroth, Puissances protectrices 229–36.

solve this problem, in all its varied facets, by providing in Article 10 of the Convention a number of methods for the designation of "substitutes" for Protecting Powers.[55] It must, however, be emphasized that the provisions of this Article should not be considered as affecting the basic method of selecting either the original Protecting Power or successor Protecting Powers as long as the Power of Origin continues to exist and to be able to function in its sovereign capacity. A successor Protecting Power, necessitated, perhaps, because the original Protecting Power has become a belligerent, is not a "substitute" for a Protecting Power within the meaning of Article 10, and its designation is governed by the same rules of customary international law as those which govern the designation of the original Protecting Power.[56] It must also be noted that a State or organization designated under the provisions of Article 10 is not a "Protecting Power" as that term is used generally in international law and as it is used elsewhere in the Convention, but is merely a State or organization performing some or all of the functions allocated to Protecting Powers by the various relevant provisions of the Convention.[57]

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[55] A substitute for the Protecting Power exercises all of the powers and performs all of the functions of a Protecting Power. *See* Article 10(6). Concerning the French proposal for an ongoing international organization to serve as the substitute for the Protecting Power and the 1949 Diplomatic Conference's decision to refer it to the governments by resolution, *see* p. 18 *supra*. The Soviet Union opposed both the French proposal and the adoption of the resolution, stating as to the latter that it "sees no need to consider this question or to create such a body, since the problem of the Protecting Powers has been satisfactorily solved by the Conventions established at the present Conference." Declaration made by the Delegation of the Soviet Union at the time of the signing of the 1949 Geneva Conventions, 1 *Final Record*, 201. The validity of that statement is considerably reduced by the fact that both the French proposal and the resolution pertained to substitutes for Protecting Powers under Article 10—and the Soviet Union made a reservation to that Article. *See* text, pp. 273–274 *infra*.

[56] Pictet, *Commentary* 117–18. Thus, when Spain withdrew as the Protecting Power for Japan in the continental United States on 30 March 1945, the Japanese Government requested Switzerland to act in that capacity, Switzerland agreed to do so, the United States gave its concurrence and, effective 21 July 1945, Switzerland assumed the functions of Protecting Power for Japan in the United States. Rich, Brief History 488. In this case Switzerland was a Protecting Power as successor to Spain; it was *not* a substitute for a Protecting Power.

[57] Article 2(e) of the 1973 Draft Additional Protocol defined a "substitute" as "an organization acting in place of a Protecting Power for the discharge of all or part of its functions." 1973 Draft Additional Protocol 3. As adopted by Committee I and as approved by the Diplomatic Conference as Article 2(d) of the 1977 Protocol I, this provision now reads:

> (d) "substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.

Article 5(6) of the 1973 Draft Additional Protocol stated that whenever mention was made therein of a Protecting Power, this "also implies the substitute within the meaning of Article 2(e)." 1973 Draft Additional Protocol 4. (This latter pro-

The first paragraph of Article 10 authorizes the High Contracting Parties to agree "to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers." It is on the basis of the foregoing that a legal foundation already exists for the various international organizations which have been proposed as substitutes for Protecting Powers;[58] and it is here that the ICRC's recently expressed willingness to assume the functions of a substitute for a Protecting Power[59] would be implemented. Moreover, if this provision and the provisions of the second paragraph of Article 10, discussed immediately below, fail to produce a substitute for a Protecting Power, then under the third paragraph of Article 10 the Detaining Power "shall request or shall accept" the services of a humanitarian organization such as the ICRC to assume the humanitarian functions of the Protecting Power.[60]

The second paragraph of Article 10 contains the controversial provisions with respect to substitutes for Protecting Powers. It provides, in substance, that where, *"no matter for what reason"* (emphasis added), there is no Protecting Power (designated under Article 8)

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vision is substantially the same as Article 10, paragraph 6, of the 1949 Convention). With some minor editing Article 5(6) of the 1973 Draft Additional Protocol was adopted by the Diplomatic Conference as Article 5(7) of the 1977 Protocol I.

[58] The French proposal, incorporated into Resolution 2 of the 1949 Diplomatic Conference, was an early example of such an organization. *See* note 55 *supra*. *See also* U.N., *Human Rights*, A/7720, §§ 224–25; *ibid.*, A/8052, paras. 245–50; 1971 GE Report, §§ 540–48; 1972 *Commentary* 25–26. One of the major functions of the new international entity proposed by the present author (see pp. 19-20 *supra*) would be as an automatic substitute for a Protecting Power. *See* Levie ,Working Paper 11-14. (The "International Fact-Finding Commission" created by Article 90 of the 1977 Protocol I does not have this function.) At the 1949 Diplomatic Conference the ICRC representative indicated that the first paragraph of Article 10 contemplated an agreement entered into in peacetime entrusting the functions of the Protecting Power to a named organization. 2B *Final Record* 61. While this is certainly a possibility, and is the basis for the proposals herein referred to, there is no reason why it could not also be implemented by the belligerents in wartime.

[59] *See* note 43 *supra*. This expressed willingness on the part of the ICRC to act as a substitute for a Protecting Power was a complete reversal of policy. At the 1949 Diplomatic Conference the ICRC representative had stated that the ICRC "could on no account be taken into consideration" to act as the organization contemplated by the first paragraph of Article 10. 2B *Final Record* 61.

[60] It is here that the ICRC felt that it belonged when the statement quoted in note 59 *supra* was made. 2B *Final Record* 63; Pictet, *Commentary* 119. However, inasmuch as it has now determined (and properly so) that all of the functions of a Protecting Power are humanitarian in nature (see note 43 *supra*), the difference between "the duties incumbent on the Protecting Powers," contained in the first paragraph of Article 10, and "the humanitarian functions performed by Protecting Powers," contained in the third paragraph of Article 10, has, for all practical purposes, disappeared. It must be borne in mind, however, that while the first paragraph of Article 10 requires the agreement of the Detaining Power and the Power of Origin, action under the third paragraph of Article 10 may be taken by the Detaining Power acting alone. Heckenroth, Puissance protectrices 263–65.

and no organization entrusted with the duties of the Protecting Power (pursuant to the first paragraph of Article 10), "the Detaining Power shall request a neutral State, or such an organization" to undertake to perform the functions assigned to the Protecting Powers by the Convention. On the surface this appears to be just one more effort to ensure the existence of a Protecting Power or of a substitute for a Protecting Power in the absence of an actual Protecting Power. The dispute which has arisen may be ascribed to the inclusion of the clause "no matter for what reason." This appears to give to the Detaining Power, acting alone, carte blanche to select a neutral State or an organization "which offers all guarantees of impartiality and efficacy" to perform the duties of a Protecting Power whenever for the moment there is no Protecting Power in being. This clause, and the entire paragraph, has been interpreted by some commentators as being limited in its application to instances in which the Power of Origin "intentionally abstains, or systematically refuses, to appoint a Protecting Power, or again, if it disappears entirely."[61] However, it can be argued just as strongly, and possibly with more legal justification, that "no matter for what reason" means exactly what it says. The Soviet and other delegates at the 1949 Diplomatic Conference objected to the quoted clause in that they believed that the right of the Detaining Power to act unilaterally in the selection of a substitute for a Protecting Power for the Power of Origin should be limited to situations in which the Power of Origin had ceased to exist.[62] There is much merit to the argument. Where the Power of Origin continues to exist, no valid reason can be discerned for discarding the established and customary procedure for the selection of either the original Protecting Power or of a successor Protecting Power.

It is true that there might be instances in which the Power of Origin fails to designate a Protecting Power—but that should not create a right in the Detaining Power to designate a substitute for the Protecting Power. Such a failure by the Power of Origin would in no manner affect the right of the Detaining Power, in its capacity as a Power of Origin, to designate a Protecting Power to act on its behalf in its enemy's territory. The Power of Origin that does arbitrarily refuse to designate a Protecting Power to act on its behalf may believe that it has good reasons for so doing—and it should not be told that if it does not take specific action to provide protection for the captured members of its armed forces, its enemy, the Detaining Power, will have the right to do so.

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[61] 1971 GE Documentation, II at 13; *accord*, Knitel, *Less Délégations du Comité International de la Croix-Rouge* 88. Even in his attempt to justify the provisions of the second paragraph of Article 10, Siordet concedes that the provision is not "clear." Siordet, Scrutiny 59–60.

[62] 2B *Final Record* 29, 347, & 351.

The major objection to the procedure contemplated by paragraph two of Article 10 is that situations may arise in which, through no fault of the Power of Origin, it has no Protecting Power, and, before it can take action to remedy this deficiency, the Detaining Power exercises its power under the second paragraph of Article 10, designating a weak and friendly "neutral" State as a substitute for a Protecting Power, and then refusing to concur in the designation of a true Protecting Power by the Power of Origin on the ground that there is no need for such a designation. To accomplish this it might refuse to concur in the designation of a Protecting Power named by the Power of Origin, or it might withdraw a concurrence previously given, or it might take action before a Protecting Power could be appointed at the onset of hostilities, or it might take action when a Protecting Power has withdrawn and there has not been time for the Power of Origin to go through the full procedure for the designation of a successor Protecting Power. All of these examples fall within the clause "no matter for what reason"; in none of them is there justification for unilateral action by the Detaining Power.[63]

All of the Communist countries (and Portugal) made reservations to Article 10 to the general effect that they would not recognize as legal "requests by the Detaining Power to a neutral State or to a humanitarian organization, to undertake the functions performed by a Protecting Power, unless the consent of the Government of the country of which the prisoners of war are nationals has been obtained."[64] While there is a perhaps not unnatural tendency to view with suspicion this position, taken at Geneva almost uniquely by the Soviet Union and its satellites,[65] it appears to have a valid basis. If there is a Power

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[63] Pictet insists that the second paragraph of Article 10 "does not affect the process of appointment of the Protecting Power" and that successor Protecting Powers are not "substitutes" for prior Protecting Powers. Pictet, *Commentary* 117–18. The latter statement is completely correct. *See* note 56 *supra*. While his statement indicates the opinion that this paragraph of Article 10 was not intended to affect the process of appointment of Protecting Powers, nowhere does he even attempt to explain the significance of the clause "no matter for what reason."

[64] Reservation of the Soviet Union to Article 10 of the 1949 Prisoner-of-War Convention, 191 *U.N.T.S.* 367, maintaining the reservations made at the time of signing, 75 *U.N.T.S.* 458–60, and 1 *Final Record* 355. The other reservations to Article 10 are substantially identical to the foregoing (minor differences are probably due to translations from different languages), except that Hungary specified that Article 10 "can only be applied if the Government of the State of which the protected persons are nationals, no longer exists." Reservation of the Hungarian People's Republic, 198 *U.N.T.S.* 338; 1 *Final Record*, 347. It would be interesting to learn why the words "country of which the prisoners of war [protected persons] are *nationals*" (emphasis added) were used rather than "country of which the prisoners of war are *members of the armed forces*."

[65] *See, e.g.*, Brockhaus, The U.S.S.R. 291. All of the Communist and Communist-oriented countries which have adhered to the Convention since 1949 have made similar reservations to Article 10.

of Origin *in esse*, not only is its consent to the designation of a Protecting Power to act on its behalf essential, but it has the right to make the selection in the first place. And the statements made at the 1949 Diplomatic Conference by the Soviet delegates making it clear that they merely desired to limit the right of the Detaining Power to select a substitute for a Protecting Power to those cases where there is no existing Power of Origin was a limitation as to which there should have been no dispute. It is to be hoped that by overruling the Soviet thesis the 1949 Diplomatic Conference did not establish the proposition that a Detaining Power may, on its own, select and designate a substitute for a Protecting Power even though there is a Power of Origin in being.

The fourth paragraph of Article 10 establishes two requirements for any neutral Power or organization invited by the Detaining Power to perform the functions of a Protecting Power (pursuant to the second paragraph of Article 10) or any humanitarian organization invited by the Detaining Power or itself offering to perform the humanitarian functions normally performed by a Protecting Power (pursuant to the third paragraph of Article 10) : first it must act with a sense of responsibility toward the Power of Origin;[66] and, second, it must furnish assurances that it has both the capability and the intent to perform the allocated functions and to perform them impartially.[67]

The fifth paragraph of Article 10 prohibits the derogation of the prior provisions of Article 10 by special agreements between the Detaining Power and the Power of Origin in those cases where the latter is unable to negotiate with the Detaining Power on terms of equality because of "military events" or the occupation of all or much of its territory.[68] Inasmuch as any such derogation would "adversely affect the situation of prisoners of war," no matter what the relative status of the two Powers, it was already prohibited by the last sen-

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[66] This requirement clearly indicates that the designation by the Detaining Power of a substitute for a Protecting Power is not limited to instances where the Protecting Power has ceased to exist as an independent sovereignty—unless we are to assume that the sense of responsibility is owed to a Power of Origin despite the fact that it no longer exists.

[67] There is no indication as to whom the assurances are to be given. If the Detaining Power is to be the recipient, and there does not appear to be any other entity that could or should be, the provision has little meaning—except as an exhortation—as the Detaining Power, by making the selection, has disclosed its acceptance of the competence of the particular Power or organization.

[68] The wording of the provision appears to contemplate the parallel possibility that the Detaining Power might be the weaker Power in the negotiations, rather than the Power of Origin. As a practical matter, this is inconceivable. When "military events" go against a Detaining Power, or its territory is occupied by the enemy, it ceases to be a Detaining Power. *See, e.g.*, Article XIX of the 1940 *Franco-German Armistice Agreement.*

tence of the first paragraph of Article 6.[69] However, the draftsmen of the Convention should certainly not be criticized for employing what might be characterized as an excess of caution for the protection of prisoners of war. They were unquestionably motivated by the events of World War II and an understandable desire to leave no doubt that there was a specific prohibition of such conduct in any future international armed conflict.[70]

c. PERSONNEL OF THE PROTECTING POWER

Article 8 of the Convention provides in part that

> . . . the Protecting Powers may appoint, apart from their diplomatic and consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

It is obvious that the Convention has accorded to a Protecting Power three sources of personnel for the performance of its functions as such Protecting Power: its diplomatic and consular officers stationed within the territory of the Detaining Power;[71] others of its nationals specifically appointed for the purpose; and nationals of other neutral Powers specifically appointed for the purpose.

The normal and natural source of personnel for the execution of the functions of a Protecting Power is, of course, the diplomatic and consular personnel of the Protecting Power already assigned to and stationed in the territory of the Detaining Power. These officials, working under the ambassador, are experienced, they are known to the officials of the Detaining Power, and, perhaps most important, they are already present within the area in which the Protecting Power is to operate. It is, of course, true that they already have their

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[69] It is difficult to understand why Article 10 is included in the list of articles in the first paragraph of Article 6 as one of the articles of the Convention expressly providing for special agreements, inasmuch as the prohibition mentioned in the text is the only reference in the Article to such agreements.

[70] After France and Belgium had capitulated in 1940, and were substantially (France) or completely (Belgium) occupied, Germany refused to continue to recognize a Protecting Power for either of them and required the "governments" of the two countries to act on behalf of the prisoners of war whom Germany continued to hold. 2B *Final Record* 112. The French "Scapini Mission" and the Belgian "T'Serclaes Mission" rarely succeeded in obtaining a solution favorable to the prisoners of war of any problem that arose; and frequently they acted as agents to fulfill German demands which violated the provisions of the 1929 Convention, rather than as "substitutes" for the Protecting Powers.

[71] Neither the 1929 Convention nor the Stockholm Draft that served as the working document at the 1949 Diplomatic Conference included the term "consular" in specifying the authorized representatives of a Protecting Power. The authorization for the use of this category of personnel by Protecting Powers was proposed by Australia during the Conference and was unanimously approved. 2B *Final Record* 58.

usual functions to perform; but many of these functions disappear or are seriously curtailed upon the advent of war (commercial, immigration, tourists and tourism, etc.). While any large-scale armed conflict of lengthy duration will undoubtedly make it necessary for Protecting Powers to supplement their regular diplomatic and consular staff within the territory of the Detaining Power, there will be numerous instances in which the Protecting Power will be able to perform its functions with only its normal complement of officials, at least for some considerable period of time and until the number of prisoners of war held by the Detaining Power makes necessary a buildup of the personnel performing the functions of the Protecting Power. Of course, the term "diplomatic and consular staff" includes not only those officials of the Protecting Power who were already stationed within the territory of the Detaining Power at the time of the designation of the Protecting Power, but also any of its other diplomatic and consular personnel who may be sent to replace or supplement them.

With the heavy commitments that Switzerland had during World War II, it would obviously have been impossible for it to have made even a pretense of performing its farflung responsibilities as a Protecting Power without a considerable increase in its staffs in the territories of the many Detaining Powers where it had agreed to serve as a Protecting Power. To meet its personnel requirements in this respect, the Swiss Government recruited locally and in Switzerland and then sent to its various affected embassies and legations "camp inspectors," who had the assigned duty of visiting prisoner-of-war camps and labor detachments to assure that there was compliance by the Detaining Power with the provisions of the 1929 Convention. This is typical of the second source of Protecting Power personnel, the use of which is authorized by the first paragraph of Article 8 of the 1949 Convention—the noncareer national who is selected by the government of the Protecting Power solely for the purpose of assisting it to perform the functions of that office.[72] These individuals may also be nationals of another neutral Power, the third source of Protecting Power personnel authorized, but normally the Protecting Power would resort to this type of selection only after it had exhausted its own manpower potential. Of course, a major source of noncareer personnel is to be found among the nationals of the Protecting Power (and of other neutral Powers) who are residing within the territory of the Detaining Power when the use of additional personnel becomes

[72] The Convention appears to use the term "representative" for the diplomatic and consular personnel of the Protecting Power and "delegate" for the noncareer personnel, whether nationals of the Protecting Power or of another neutral State. Throughout this study the term "representative" has been used to include all individuals performing duties for the Protecting Power *qua* Protecting Power, without regard to their prior status. (The word "delegate" is used with respect to the ICRC personnel. This latter is in accordance with the Convention practice.)

necessary. The Protecting Power may find it more convenient, when it has exhausted the manpower pool of its own nationals residing within the territory of the Detaining Power as a source, to use nationals of other neutral Powers residing within the territory of the Detaining Power before resorting to the policy of recruiting its own nationals in its own territory and sending them to the territory of the Detaining Power.[73]

It will have been noted that these noncareer, or auxiliary, persons, selected to assist in the performance by the Protecting Power of its functions under the Convention, are subject to the approval of the Detaining Power. This provision was the occasion for considerable discussion at the 1949 Diplomatic Conference. No objection can be perceived to this procedure. The diplomatic and consular personnel of the Protecting Power stationed within the territory of the Detaining Power must have the normal approval of government of the Power to which they are accredited (*agrément, exequatur*) required for all such personnel, and any one of them may, at any time, be declared *persona non grata* by that Power. There is certainly no reason why the individuals who will serve as supernumeraries to the Embassy of the Protecting Power in the territory of the Detaining Power for the purposes of the Convention should be subject to fewer restrictions than the career personnel of the Embassy and the consular corps who will actually be the first to perform the functions of a Protecting Power for their country.[74]

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[73] The problem of the availability of competent personnel to serve as supernumeraries has been a matter of concern for a considerable period of time and to many organizations. *See, e.g.*, Resolution XXII of the XXth International Conference of the Red Cross, held in Vienna in 1965, reproduced in 1971 GE Documentation, II, at 020; Articles 2–5 of the *Regulations Drafted by the Commission Médico-Juridique de Monaco* in 1971, reproduced in U.N., *Human Rights*, A/8370, at 80–81 (English) and in 1972 *I.L.A. Rep.* 307 (French); 1971 GE Report 108, & 114; 1972 *Basic Texts* 7; and Article 6 of the 1973 Draft Additional Protocol. (This latter, with some editing has become Article 6 of the 1977 Protocol I.) Thus, Europeans without training or experience are likely to cause problems if given duty in an area with a completely unfamiliar climate and culture. A camp inspector who reports that the prisoners of war are not getting enough meat, when they are receiving their national diet of fish and rice, is not being very helpful; nor is the inspector who criticizes the Detaining Power for not providing mattresses when it has furnished the prisoners of war with the pallets on which they are accustomed to sleep.

[74] Siordet, Scrutiny 27. A provision of the Stockholm Draft that served as the working document at the 1949 Diplomatic Conference would have required a Detaining Power to give "serious grounds" for any refusal to approve the nomination of a noncareer individual by a Protecting Power. Revised Draft Conventions 54; 1 *Final Record* 75. This proposal was completely lacking in logic. A State need give no reason for refusing to agree to the assignment to a post in its territory of a member of the diplomatic or consular service of a Protecting Power, or for declaring such an individual *persona non grata*. Why, then, should it be required

The fear has been expressed that a Detaining Power might arbitrarily refuse to approve any of the auxiliary personnel nominated by the Protecting Power and thereby make it impossible for the latter to perform its functions properly. But a Detaining Power so minded could also, and with equal ease, arbitrarily decline to grant the necessary *agrément* or *exequatur* to replacement or supplementary diplomatic or consular personnel of the Protecting Power, or even declare *persona non grata* a number of the persons in these categories already serving within its territory. Any of these acts would constitute a violation of the spirit, and probably of the letter, of the Convention. Moreover, the Protecting Power, a friendly neutral Power, might well consider any such action by the Detaining Power as an unfriendly act.

Requiring the Detaining Power's approval of the individual supernumeraries is also logical from another standpoint. The individuals concerned will, in the performance of their duties, be required to do considerable traveling in a country at war. Any country at war will have instituted controls on the right to enter into and to travel within its territory. To tell it that it must accept anyone selected by the Protecting Power, even though it has good reason not to trust the particular individual, is to close one's eyes to the facts of life. And for this same reason, the Detaining Power must retain the right to declare members of the staff of the Protecting Power *persona non grata*, whether the individual concerned has diplomatic, consular, or auxiliary status.

It has been stated that the representatives of the Protecting Power engaged in fulfilling its obligations in the territory of the Detaining Power, have a triple responsibility: to their own government; to the government of the Power of Origin; and to the government of the Detaining Power.[75] If this is another way of saying that these individuals must be completely neutral and unbiased, it is correct. It would, however, be less controversial to state, as did United States Secretary of State Bryan in 1914, that they are "representatives of a neutral power whose attitude toward the parties to the conflict is one of impartial amity."[76]

d. FUNCTIONS OF THE PROTECTING POWER

With only a very few exceptions, the draftsmen of the 1949 Convention apparently thought it best to avoid any attempt to specify in detail the functions of a Protecting Power or even to include functions in the form of specific powers granted to a Protecting Power. Most frequently the functions are expressed either in the form of duties of

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to do so with respect to noncareer supernumeraries? The provision of the Stockholm Draft was deleted at Geneva. 2B *Final Record* 58, 110.

[75] de LaPradelle, Le contrôle 344. *See also* note 27 *supra*.

[76] *See* note 11 *supra*. *See also* Franklin, *Protection* 114.

the Detaining Power or of rights of the prisoners of war. Where a precedent had previously been established, it is usually set forth in appropriate detail. Where no precedent had previously been established, the problem is frequently left to *ad hoc* decision. It was probably anticipated that such problems would be solved by the Protecting Power through the exercise by it of the basic power guaranteed to it by the first paragraph of Article 8, that of surveillance to ensure that there is, at all times, full compliance with the provisions of the Convention; reinforced by the provisions of the second paragraph of Article 8, which require the belligerents to facilitate "to the greatest extent possible" the work of the Protecting Powers. Should a Protecting Power ascertain that there is a default in the performance by the Detaining Power with respect to a particular provision, it is probably assumed that it will advise the Detaining Power thereof, and find some means of procuring a correction of the situation, even though the procedure by which it is to accomplish this is not specified.[77]

Nevertheless, the Convention does contain repeated references to the institution of the Protecting Power and a function may usually be implied in a particular instance merely from such reference. It is indeed difficult to categorize these varied references to the Protecting Power. Extremely broad categories are required and even then not every function will fall within them. Several partially successful efforts have been made to list these references on a functional basis.[78] This discussion will consider them under three very general categories: (1) powers and duties; (2) liaison functions; and (3) miscellaneous functions.

(1) *Powers and Duties*

The basic and overriding power granted to a Protecting Power by the 1949 Convention is, of course, that contained in the first paragraph of Article 8, the very first sentence of which, as we have seen, states that the Convention "shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict."[79] Strangely enough, the

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[77] At the 1949 Diplomatic Conference the representative of New Zealand, Quentin-Baxter, made the following statement: "It is not the function of the Protecting Power to command or to overrule: it is its fuction to observe, to comment, to make representations, and to send reports to the outside world. If we are faced with an unscrupulous belligerent, the presence of the Protecting Power and the ability of the Protecting Power to examine what is going on and to observe is the only preventive measure which we have." 2B *Final Record* 344.

[78] Thus, Heckenroth, Puissances protectrices 135 and Janner, *Puissance protectrice* 52, have each listed seven separate categories of functions of the Protecting Power, but the lists coincide with respect to only four functions. Still a third functional listing appears in Pictet, *Commentary* 98–99 (reproducing a list that had originally appeared in Siordet, Scrutiny 73–75).

[79] *See* p. 262 *supra.*

only extended debate on this extremely crucial article that took place at the 1949 Diplomatic Conference concerned the selection of the proper word to characterize the activities of the Protecting Power, and that debate, it developed, occurred primarily as a result of difficulties of translation. The delegates at the Conference were agreed that the Protecting Power could not give orders or directives to the Detaining Power. The idea desired to be conveyed was that the authority of the Protecting Power would entitle it to verify whether the Convention was being properly applied and, if necessary, to suggest measures on behalf of prisoners of war.[80] In the text of the Stockholm Draft, the working draft used at the 1949 Diplomatic Conference, the words "under the supervision of the Protecting Powers" were used in the English version and the words *"sous le contrôle des Puissances protectrices"* in the French. This was acceptable to the French-speaking delegates but was opposed by those whose mother tongue was English. It eventually became apparent that the two groups were actually in agreement and that the seeming dispute had arisen because the word *"contrôle"* in French is much weaker than either "control" or "supervision" in English. The English-speaking delegations were given a choice of a number of words to be used as a counterpart for the French word, and unanimous agreement was ultimately reached on the word "scrutiny."[81]

The importance of the first paragraph of Article 8 may, perhaps, be found to lie in the very generality of its phrasing. The fact that the entire Convention is to be "applied with the cooperation" of the Protecting Power undoubtedly empowers the latter to make suggestions to the Detaining Power with a view to the improvement of the lot of the prisoner of war even with respect to areas in which no specific reference is made to the Protecting Power. Thus, a Protecting Power might suggest to, and seek to obtain the agreement of, the Detaining Power that certain specified types of offenses committed by prisoners of war be uniformly punished by disciplinary rather than judicial measures, even though Article 83 contains no reference to the Protecting Power. Similarly, the fact that the Convention is to be applied "under the scrutiny" of the Protecting Power undoubtedly empowers it to investigate, and to request reports from the Detaining Power, in unspecified areas. Thus, a Protecting Power might seek from the Detaining Power a complete report as to the reason for the prohibition of correspondence, even though Article 76, dealing with this subject, contains no mention of the Protecting Power; and, again, it might seek a report as to the action taken with respect to a complaint made by a prisoner of war or a prisoners' representative,

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[80] 2B *Final Record* 110.

[81] *Ibid.* For some of the many English words proposed, see *ibid.*, 19–20 & 57–58. *See also* Siordet, Scrutiny 24–25.

through the Protecting Power, regarding the conditions of capitivity, even though the second and fourth paragraphs of Article 78, which provide for such complaints, do not specifically provide for such reports.

The first two paragraphs of Article 126 empower the representatives of the Protecting Power to visit all places where prisoners of war may be, themselves selecting the places they will visit and determining the frequency of the visits; to have access to all premises where prisoners of war are confined; to go to the place of departure, passage, and arrival of prisoners of war who are being transferred;[82] and to interview prisoners of war and prisoners' representatives without witnesses.[83] The background of these provisions warrants discussion.

As we have seen, the difficulties encountered by Protecting Powers early in World War I gradually disappeared and, before its conclusion, the Protecting Powers were generally enabled by the Detaining Powers to visit and inspect prisoner-of-war camps.[84] Thereafter, the second paragraph of Article 86 of the 1929 Convention authorized the Protecting Power to visit any place, "without exception," where prisoners of war were interned.[85] Despite the clear import of this provision, early in 1940 problems were again encountered in this area.[86] However, apart from Japan, and, to some extent, Germany, the Detaining Powers and the Protecting Powers of World War II were largely able to resolve these difficulties in due course. Unfortunately, even though the problem which had arisen with regard to visits to prisoner-of-war camps in occupied territories was well known, the draftsmen of the 1949 Convention took no clear-cut action to ensure against its recurrence. True, the first paragraph of Article 126 authorizes the representatives of the Protecting Power "to go to all places where prisoners of war may be, particularly to places of internment,

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[82] *See* pp. 187-194 *supra.*

[83] *See* p. 283 *infra.*

[84] *See* note 13 *supra. See also* Charpentier, La Convention de Genève 38–39.

[85] Two widely disparate authors have termed this the most important activity of the Protecting Power (Janner, *Puissance protectrice* 52) and one of the most important safeguards for prisoners of war (Mason, *Prisoners of War* 41).

[86] 6 Hackworth, *Digest* at 285. In particular, difficulties continued to be encountered with respect to visits to prisoner-of-war installations located in occupied territories despite the "without exception" clause in the 1929 Convention. *Ibid.; I.M.T.F.E.* 1129. (Article XI of the 1917 *Anglo-Turkish Agreement* had specifically excluded prisoner-of-war camps located in occupied territory from those which the representatives of the Protecting Powers would be permitted to visit. It may be assumed that this was one of the reasons for the "without exception" provision in the subsequently drafted 1929 Convention.)

imprisonment and labour";[87] and the second paragraph thereof states that such representatives "shall have full liberty to select the places they wish to visit"; and it was without any doubt the intent of the 1949 Diplomatic Conference that these broad provisions should include prisoner-of-war installations located in occupied territories. However, any possibility of a dispute with regard to the interpretation of the quoted provisions could have been completely eliminated by merely adding the phrase "including those located in occupied territories" wherever appropriate. This was particularly desirable because the omission of the words "without exception" could arguably be construed as an intent to make the visitation privilege granted by the first two paragraphs of Article 126 less all-inclusive than it had been under the second paragraph of Article 86 of the 1929 Convention.

During World War II a number of Detaining Powers required that the Protecting Powers provide them in advance with a schedule of proposed visits to prisoner-of-war installations. This was sometimes justified by the provision of the third paragraph of Article 86 of the 1929 Convention, which stated that "[t]he military authorities shall be informed of their visits." During World War I it had frequently been found that this type of requirement rendered the inspection comparatively ineffective;[88] and events of World War II disclosed the same deficiency.[89] The quoted provision of Article 86 of the 1929 Convention was omitted from Article 126 of the 1949 Convention, which may be considered to be the successor article. However, there is no specific rejection of the requirement, and it is unlikely that Detaining Powers will discontinue the practice of requiring advance notice of visits of inspection by representatives of the Protecting Power.[90]

The procedure followed by the representatives of the Protecting Powers in conducting an inspection of a prisoner-of-war installation is not prescribed in detail[91] and will largely be determined by the

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[87] The right of visitation granted by the first paragraph of Article 126 is iterated in Articles 56 as to labor detachments; 98 as to prisoners of war undergoing disciplinary punishment; and 108 as to prisoners of war undergoing judicial punishment.

[88] United Kingdom, Foreign Office, *The Treatment of Prisoners of War in England and Germany during the First Eight Months of the War* 8 (1915); Charpentier, *La Convention de Genève* 39 & 43.

[89] Maughan, *Tobruk* 763; Mason, *Prisoners of War* 42. The ICRC delegates labored under the same handicap. 1 ICRC *Report* 230 & 244.

[90] United States Military Assistance Command, Vietnam (MACV), Directive 190-6, 22 September 1970, Military Police; ICRC Inspection of Detainee/Prisoner of War Facilities, para. 6a, specified the action to be taken "[u]pon receipt of proposed itinerary of the ICRC delegation." In recommending the deletion of the provision requiring notice to the military authorities prior to a visit to a prisoner-of-war installation, the ICRC itself indicated that the procedure should be "settled by practice." *Draft Revised Conventions* 133.

[91] It may be noted that during World War II some Detaining Powers limited the number of visits which could be made to a prisoner-of-war installation by the

inspector himself, usually based upon specific instructions received from his goverenment, the Protecting Power.[92] While the inspector will normally wish to visit every part of the installation (quarters, kitchens, mess halls, washrooms, toilets, showers, laundries, medical facilities, recreational and sports facilities, prison, etc., etc.), a great deal of his most valuable information with respect to deficiencies on the part of the Detaining Power will usually come from the prisoners' representatives and from the prisoners of war themselves. The second paragraph of Article 86 of the 1929 Convention permitted him to interview these individuals and provided that such interviews would be "as a general rule without witnesses." Such a provision was, of course, an invitation for the Detaining Power to make every case the one which does not fall within the general rule.[93] This escape clause was properly omitted when the first paragraph of Article 126 of the 1949 Convention was drafted, the words "as a general rule" being dropped so that the interview is now to be "without witnesses" in all cases.[94]

Two practices have evolved with regard to the results of the inspections: first, the representative of the Protecting Power who makes

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representatives of the Detaining Power. Article 126 now provides in its second paragraph that "the duration and frequency of these visits shall not be restricted."

[92]The checklist used by the United States as a Protecting Power in the early period of World War II may be found in Franklin, *Protection* 224–25. Concerning the checklist used by Switzerland, containing 50 items, see *ibid.*, 224 n.83. One critic characterized the inspection visits as being "très courtes et très superficielles." Tchirkovitch, Nouvelles conditions 106. Prisoners of war whose places of internment were visited usually felt otherwise. *See, e.g.*, American Prisoners of War 30 & 39. There is always the danger that a camp inspector raised in one culture will be unable to make a proper evaluation of the facilities of a prisoner-of-war camp that are established for (and, perhaps, by) individuals of a completely different culture. *See, e.g.*, note 73 *supra*.

[93] I.M.T.F.E. Prosecution Exhibit No. 1965 included a set of Japanese "Detailed Regulations for the Treatment of Prisoners of War," dated 21 April 1943. (This was probably a revision of an earlier set dated 31 March 1942. *See I.M.T.F.E.* 1107–08.) Article 13 of those Regulations provided that "a guard shall also be present at this interview." This provision was the subject of repeated, but unsuccessful, objections by the Swiss Minister, representing the Protecting Power. *I.M.T.F.E.* 1132.

[94] Here we are fortunate in having some very clear legislative history. The Australian delegate at the 1949 Diplomatic Conference proposed the elimination of the words "without witnesses" from the then Article 115 and the Venezuelan delegate strongly opposed such action. 2A *Final Record* 303. The matter was referred to Committee II which, in its report, did not adopt the Australian proposal. *Ibid.*, 379. (In Franklin, *Protection* 227, the author states that during World War II it was standard practice for the representative of the Protecting Power to refuse to accept from, or to give to, a prisoner of war during the private interview any paper or object not previously passed by the camp authorities. The United States has indicated its expectation that this practice will continue. U.S. Army *Regs.* 633–50, para. 45c.)

the inspection will usually conclude his visit by discussing with the camp commander any objectionable practices which he has found to exist, thus seeking to eliminate them without the need for a formal report of the deficiency;[95] and, second, the Protecting Power's formal report is submitted to the Power of Origin only, not to the Detaining Power.[96] This latter practice probably evolved as a result of the desire of Protecting Powers to avoid being the recipient of recriminations from the Detaining Power because of an adverse report.[97] However, the result is that, apart from any information received informally by the camp commander directly from the representative of the Protecting Power making the inspection, the Detaining Power is not advised of the existence of violations of the Convention of which it may be completely unaware, and there is no opportunity for the Detaining Power to rectify the situation until it has attained the status of a formal protest by the Power of Origin.

The importance of visits by representatives of Protecting Powers to all places where prisoners of war may be detained was emphasized during the hostilities in Vietnam, where the ICRC was permitted to perform the humanitarian functions of the Protecting Power, including inspections of prisoner-of-war installations, in the Republic of Vietnam (South Vietnam), but not in the Democratic Republic of Vietnam (North Vietnam). The XXIst International Conference of the Red Cross, an international organization which includes as members almost every national Red Cross Society in the world, meeting in Istanbul in 1969, adopted a resolution calling upon "all Parties to allow the Protecting Power or the International Committee of the Red Cross free access to prisoners of war and to all places of their detention";[98] and the General Assembly of the United Nations adopted a resolution in 1970 calling upon "all parties to any armed conflict . . . to permit regular inspection, in accordance with the Convention, of all places of detention of prisoners of war by a protecting Power or humanitarian organization such as the International Committee of the Red Cross."[99] Even though these two calls were completely disregarded by the Democractic Republic of Vietnam, they take their place in history as indicative of a widely acknowledged recognition of the need for the Protecting Power to be permitted to perform the extremely important function allocated to it by the Convention—the visitation to, and inspection of, all prisoner-of-war installations.

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[95] Franklin, *Protection* 226–27; Rich, Brief History 487.

[96] Janner, *Puissance protectrice* 53; Rich, Brief History 487. For the different ICRC practice, see p. 311 *infra*.

[97] Franklin, *Protection* 225.

[98] Resolution XI, XXIst International Conference of the Red Cross, 9 *I.R.R.C.* 614 (1969).

[99] G.A. Res. 2676, 25 U.N. GAOR Supp. 28, at 77, U.N. Doc. A/8028 (1970).

The second paragraph of Article 78 grants to prisoners of war the right, which may not be restricted by the Detaining Power, to make complaints to the Protecting Power "regarding their conditions of captivity"—which, of course, means that they may complain to the Protecting Power regarding alleged failures of the Detaining Power to comply with the provisions of the Convention.[100] These complaints may be made and submitted through the prisoners' representative, or, if the prisoner of war so desires, directly to the representatives of the Protecting Power.[101] The third paragraph of Article 78 provides that if a complaint is made in writing it must be transmitted immediately and it may not be counted against the complaining prisoner of war's correspondence quota;[102] and, even if it is found to be without any foundation, such a complaint may not be the basis for the punishment of the prisoner of war by the Detaining Power.[103]

Other powers and duties of the Protecting Power are indeed varied. For example, the first paragraph of Article 11 directs it to lend its good offices to assist in settling disputes with respect to the application and interpretation of the Convention;[104] the second paragraph of Article 65 authorizes it to inspect the financial records of individual prisoners of war;[105] the first paragraph of Article 71 empowers it, in the overall interests of the prisoners of war, to permit the Detaining Power to reduce below the specified minimum the number of items of correspondence which may be dispatched each month by each prisoner of war;[106] the third paragraph of Article 72 permits

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[100] This practice originated in the bilateral agreements negotiated during the course of World War I. *See, e.g.*, Article LIV of the 1918 *Anglo-German Agreement* and Article 118 of the 1918 *United States-German Agreement.* It was thereafter included in the second paragraph of Article 42 of the 1929 Convention.

[101] During World War II some Detaining Powers required that the complaint be in writing and be submitted through channels (*e.g., German Regulations,* No. 20, para. 226); while others permitted it to be made orally and directly to the representative of the Protecting Power while he was visiting and inspecting a prisoner-of-war installation. *POW Circular No. 1,* para. 165.

[102] *See* note II-179 *supra.*

[103] Article 120 of the 1918 *United States–German Agreement* made an unfounded complaint a basis for punishment if it contained "intentionally insulting statements or intentionally false accusations." This would provide too much latitude to the Detaining Power and would have a chilling effect on the exercise by prisoners of war of their right to complain. Article LIV of the 1918 *Anglo-German Agreement* merely permitted the Detaining Power to withhold complaints "which are intentionally false or are written in insulting language." During World War II, on at least one occasion, the Japanese tortured a prisoner of war for daring to complain to the representative of the Protecting Power and prevented him from seeing the representative on the latter's next visit to the prisoner-of-war camp. *I.M.T.F.E.* 1132–33.

[104] *See* p. 81 *supra.*

[105] *See* note II-470 *supra.*

[106] *See* p. 147 *supra.*

it, once again in the overall interests of the prisoners of war, to propose a limit on the number of packages which each prisoner of war may receive;[107] the first paragraph of Article 75 allows it to take over the transport of capture cards, correspondence, packages, and legal documents should military operations prevent the Detaining Power from fulfilling its obligations in this respect;[108] the first paragraph of Article 96 gives it the right to inspect the records of disciplinary punishment;[109] and the second and fifth paragraphs of Article 105 establish its duty to find counsel for a prisoner of war against whom judicial proceedings have been instituted, and its right to attend the trial.[110]

(2) *Liaison Functions*

In its liaison capacity the Protecting Power is actually little more than a conduit—but a very important one. It serves as the means of relaying necessary communications between the Detaining Power and the Power of Origin. Not infrequently, it will be the sole means readily available for the transmittal of messages between the two belligerents. And, of course, while a great many liaison functions are specifically set forth in the 1949 Convention, this is one area in which a protecting Power may improvise and undertake liaison missions which are not among those enumerated in the Convention.

Article 23, paragraph three, requires the Detaining Power to give to the Protecting Power for relay to the Power of Origin information concerning the geographical location of all prisoner-of-war camps so that the prisoners of war will not, as has happened, accidentally become the target of their own compatriots.[111] The fourth paragraph of Article 60 provides that the reasons for any limitation placed by the Detaining Power on the amount of funds made available to prisoners of war from advances of pay must be conveyed to the Protecting Power, presumably for transmittal to the Power of Origin.[112] The first paragraph of Article 62 obligates the Detaining Power to advise the Protecting Power, for relay to the Power of Origin, of the rate of daily working pay which it has fixed.[113] Transmittals of funds by prisoners of war to recipients in their own country are, pursuant to the third paragraph of Article 63, made by notification from the Detaining Power to the Power of Origin through the medium of the Pro-

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[107] *See* p. 161 *supra*. (The article fails to indicate to whom the proposal is to be made.)

[108] *See* p. 162 *supra*.

[109] *See* p. 325 *infra*.

[110] *See* pp. 334, & 336–337 *infra*.

[111] *See* p. 123 *supra*.

[112] *See* p. 200 *supra*.

[113] *See* p. 202 *supra*.

tecting Power.[114] Notifications with respect to the status of the financial accounts of prisoners of war (Article 65, last paragraph)[115] and of prisoners of war whose captivity has terminated, through escape, death, or any other means (Article 66, first paragraph)[116] are also sent by the Detaining Power to the Power of Origin through the medium of the Protecting Power. The first paragraph of Article 68 provides that claims of prisoners of war for injury or disease arising out of assigned work are similarly transmitted.[117] Article 69 requires that information with respect to the measures taken by the Detaining Power to enable prisoners of war to communicate with the exterior must be transmitted to the Power of Origin through the Protecting Power.[118] The first paragraph of Article 100 states that the Protecting Power must be informed, presumably for relay of the information to the Power of Origin, as well as for its own use, of all offenses punishable by death under the laws of the Detaining Power.[119] And Article 128 provides that during the course of the hostilities each belligerent will furnish to the other, through the Protecting Power, an official translation of the Convention (this assumes that the Party's language is other than English, French, Russian, or Spanish, in which languages there are, pursuant to Article 133, universal translations) and of all laws and regulations adopted to ensure the application thereof.

In several instances the Convention provides for the exchange of information between the belligerents without specifying how this exchange is to be accomplished. Unquestionably, these are areas in which, as stated above, the Protecting Power would feel qualified to intervene, even though it has no specific mandate. For example, the last paragraph of Article 21 provides for an exchange of information between belligerents as to their respective laws and regulations on the subject of parole;[120] the first paragraph of Article 43 provides for an exchange of information with respect to military titles and ranks;[121] and the second paragraph of Article 43 requires the De-

[114] *See* p. 208 *supra.*

[115] *See* pp. 209–210 *supra.*

[116] *See* p. 211 *supra.*

[117] *See* p. 251 *supra.*

[118] *See* p. 153 *supra.*

[119] *See* p. 339 *infra.* This presumption is buttressed by the fact of the requirement of the second paragraph of Article 100 that other offenses may not thereafter be made punishable by death without the concurrence of the Power of Origin.

[120] *See* p. 400 *infra.*

[121] *See* p. 168 *supra.* Subparagraph (b) of Article 33, the comparable provision with respect to medical personnel, provides that the belligerents "shall agree at the outbreak of hostilities on the subject of the corresponding ranks of the medical personnel." To reach such an agreement the belligerents would assuredly avail themselves of the services of their Protecting Powers.

taining Power to recognize the promotions of prisoners of war of which it has been notified by the Power of Origin:[122] but none of these provisions states how the information is to be exchanged or conveyed. The Protecting Powers are available and competent to perform this liaison function; and it may be assumed that either the belligerents will request their services for this purposes or the Protecting Powers will themselves offer their services for the transmittal of the required information.

(3) *Miscellaneous Functions*

There are a number of references to the Protecting Power in the 1949 Convention which cannot rightly be designated as powers or duties, but which are likewise not precisely liaison functions. For lack of a more descriptive term, and because, for the most part, they bear little or no relationship to each other, they are here considered as miscellaneous functions.

Thus, the second and third paragraphs of Article 12 provide that if a Detaining Power, to whom prisoners of war have been transferred by another Detaining Power, fails to carry out the provisions of the Convention with respect to those transferred prisoners of war, the transferor Detaining Power will, upon being notified to that effect by the Protecting Power, either take measures to correct the situation or request the return of the prisoners of war concerned.[123] And the first paragraph of Article 58 indicates, without specifically so providing, that at some point after the outbreak of hostilities the Detaining Power and the Protecting Power will enter into an arrangement relating to the possession of money by prisoners of war.[124]

The last paragraph of Article 60 directs the Detaining Power to provide to the Protecting Power "without delay" the reasons for any limitations imposed on the amount available to prisoners of war from their advances in pay; the last paragraph of Article 78 provides that the prisoners' representative may send periodic reports to the Protecting Power concerning the conditions of captivity and the special needs of the prisoners of war;[125] the fourth paragraph of Article 79 requires the Detaining Power to inform the Protecting Power of its reason therefor when it refuses to approve a duly elected prisoners' representative;[126] and the last paragraph of Article 81 requires the

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[122] *See* p. 169 *supra.*

[123] *See pp.* 105–106 *supra.*

[124] *See* p. 196 *supra.*

[125] *See* pp. 301–302 *infra.* Presumably, matters falling within the first area would be a basis for investigation upon the next visit of representatives of the Protecting Power to the particular prisoner-of-war camp; and matters falling within the second area would be passed on to the Power of Origin or to representatives of humanitarian or relief organizations operating in the territory of the Detaining Power.

[126] *See* p. 297 *infra.*

Detaining Power to inform the Protecting Power of its reasons for dismissing a prisoners' representative.[127] In none of these articles is there any indication of the action which it is contemplated that the Protecting Power will take when the required information is given to it. While the information might, in the exercise of the Protecting Power's liaison function, be passed to the Power of Origin, in many cases this action alone would have little or no significance. However, under its general right to scrutinize the application of the Convention, the Protecting Power would undoubtedly, in appropriate cases, take issue with the Detaining Power's action.

Further, the first two paragraphs of Article 121 provide that the Detaining Power shall investigate and make a full report to the Protecting Power with respect to every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, or where the cause of death is unknown; and the last paragraph of Article 121 provides that if guilt is indicated, the Detaining Power shall prosecute the responsible persons. Certainly, it is expected that the Protecting Power would forward a copy of the report of the incident to the Power of Origin; but it is equally certain that the Protecting Power would, on its own initiative, make *démarches* to the Detaining Power if it felt that the investigation had been inadequate or that a prosecution indicated by the investigation had not taken place.[128]

It is believed that the foregoing short presentation of only a few of the provisions contained in the 1949 Convention clearly discloses that a Protecting Power has certain miscellaneous functions, both specified and unspecified, which can probably become whatever a particular Protecting Power desires them to be.

(4) *Limitations on the Activities of Protecting Powers*

The last paragraph of Article 8 imposes two specific limitations on the activities of the representatives of the Protecting Power: first, they may not exceed their mission; and, second, in performing their mission they must "take account of the imperative necessities of security" of the Detaining Power.[129] Certainly, it should not even be

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[127] *See* p. 299 *infra*.

[128] Pictet, *Commentary* 571. This was apparently the reaction of the ICRC, when performing the humanitarian functions of the Protecting Power in India in 1972, to episodes involving the killing of a number of Pakistani prisoners of war by Indian guards. *Washington Post*, 23 December 1972, at A-16, col. 1.

[129] The Soviet Union had proposed a provision restricting the activities of the representatives of the Protecting Power with respect to "sovereignty," "security," and "military requirements." 2B *Final Record* 59. The French representative at the 1949 Diplomatic Conference then made a substitute proposal which included not only the two limitations mentioned but also a proposed third sentence of the last paragraph of Article 8 discussed in the text. The Soviet proposal was rejected and the French proposal was adopted. *Ibid.*, 74 & 110–11.

necessary to admonish a representative of the Protecting Power that he should not go beyond his mission. (If he does so, or attempts to do so, he will very quickly find himself *persona non grata*, not only to the Detaining Power but also to his own State, the Protecting Power.) There can therefore be no objection to this provision which is, at worst, surplusage.

If we could be certain of the meaning of the directive to "take account of the imperative necessities of security" of the Detaining Power, we would be better able to judge the need for its inclusion in the Article. What are some of the "imperative necessities of security" of the Detaining Power? As we shall see in a moment, they are not "imperative *military* necessities." In any event, inasmuch as the representatives of the Protecting Power are the ones called upon to make the ultimate decision, and not the Detaining Power, any attempt by the latter to restrict the activities of the representatives of the Protecting Power on the basis of "imperative necessities of security" when, in the considered opinion of such representatives there is no valid ground for such a restriction, would undoubtedly constitute a flagrant violation of the provisions of the Convention and would result in a protest by the Protecting Power and, probably, by the Power of Origin.[130]

As originally approved, the last paragraph of Article 8 had a third sentence which did permit the Detaining Power to restrict the activities of the representatives of the Protecting Power "as an exceptional and temporary measure when this is rendered necessary by imperative military necessities."[131] At that time an article indentical to Article 8 was contained in the drafts of each of the four conventions then under consideration at the 1949 Diplomatic Conference.[132] When the matter eventually came before the Plenary Meeting, it was proposed that the limitation quoted immediately above be retained in the First and Second Conventions but that it be deleted from the Third and Fourth Conventions. The importance of the distinction drawn between the two pairs of conventions was fully appreciated at the time of the drafting of the conventions and was the occasion for some spirited debate.[133] While on its face the decision reached by the Diplomatic

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[130] Of course, if the representative of the Protecting Power decides that there are no "imperative necessities of security" to be taken into account and the Detaining Power disagrees, the representative of the Protecting Power may shortly find himself *persona non grata;* but this will not affect his decision.

[131] *See* note 129 *supra.*

[132] It was the so-called Common Article 6/7/7/7. In the final drafts of the four conventions it became Common Article 8/8/8/9.

[133] The proponents of the making of the distinction between the two pairs of conventions argued that it was "obvious and reasonable that the activities of a Protecting Power in sea warfare and on the field of battle must be restricted," but

Conference to adopt the proposal was plainly a victory for those who sought to exclude to the maximum extent the possibility of any shackles being placed on the Protecting Power in the performance of its functions with respect to prisoners of war, it remains to be seen whether this result was actually attained.[134]

The second paragraph of Article 126, authorizing the representatives of the Protecting Power to select the prisoner-of-war installations which they desire to visit, continues to include in its provisions a restriction similar to the one that was stricken from the last paragraph of Artcle 8. It provides that such visits "may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure."[135] Assuming that the Detaining Power desires to impose such "exceptional and temporary" restrictions on the visits of representatives of the Protecting Power to certain prisoner-of-war installations, or the even more extensive restrictions on the activities generally of the Protecting Power which are asserted by some States to exist, whether or not specified in the Convention, how and by whom is the decision to be made as to whether "imperative military necessity" does, in fact, exist? There is one school of thought which has advanced the position that it would be illogical to permit the determination to be made by the Detaining Power itself, as it would be judging its own case, and which insists that only the Protecting Power can validly make such a determination.[136] While there is much to be said in favor of this position from a strictly humanitarian point of view, it cannot, as a practical matter, be justified. If, for example, the Detaining Power deems it essential to keep

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that as to the Prisoner-of-War and Civilians Convention "the vital force which animates those rules and gives them effect is the presence of the Protecting Power." 2B *Final Record* 344.

[134] The pessimism which may be apparent in the text is occasioned by the fact that the Soviet Union took the position that, even without such a restrictive limitation in the Convention, it would exist in fact. *Ibid.*, 345. It is to be feared that this attitude presages an attitude by the Soviet Union, with respect to the activities of the Protecting Power, similar to that taken by Japan during World War II. *See* note 21 *supra*.

[135] The failure to strike this provision from the second paragraph of Article 126 when it was stricken from the last paragraph of Article 8 was not inadvertent. 2B *Final Record* 344–45. It is the sole area in which the Convention specifically permits the activities of the Protecting Power to be restricted by the Detaining Power. While it is, of course, a very important one, it is not believed that a Detaining Power could really justify the imposition of such a restriction except in very rare cases, such as prohibiting visits to extremely forward collecting points during the course of an actual attack.

[136] Pictet, *Commentary on the First Convention* 101. Even there it is admitted that "this is precisely what it [the Protecting Power] would, in such a case, be debarred from doing. It will only be possible to show after the event whether or not the restriction was justified." In Pictet, *Commentary* 611, published 8 years later, a much more realistic approach was taken.

representatives of the Protecting Power temporarily out of an area where prisoner-of-war installations are located, lest military movements therein inadvertently lead to the disclosure of important impending military actions, there would be little logic in compelling it to advise the Protecting Power what and why it was so doing in order to permit the latter to determine whether imperative military necessity actually existed and whether the restriction on visits to that area was really justified. This is unquestionably a matter which will adjust itself in the course of events and through reciprocal actions of the belligerents, inasmuch as time and experience will very quickly result in an informal mutual appreciation as to where the line is to be drawn.[137]

3. Conclusions

The past century has seen tremendous advances made in the concept of the Protecting Power as an institution of international law both in the role which it is called upon to play and in the prestige which it enjoys and which contributes substantially in enabling it to perform the numerous functions which have now been assigned to it. It appears beyond dispute that

> The presence of the Protecting Powers today remains the sole means of putting a brake on the excesses of Detaining Powers, the sole element of moderation and of morality in the treatment of enemy persons, their belongings, and their interests; this was noted and affirmed many times at Geneva.[138]

The accomplishments of the 1949 Diplomatic Conference with respect to the Protecting Power reveal clearly that the nations of the world were generally prepared to erect a solid basis for its activities. It was assigned a mission of close observation of the application of the provisions of the conventions drafted at that Conference, including the Prisoner-of-War Convention, a mission which necessarily incorporates within it a right to call to the attention of the Detaining Power any failure of performance which it finds and to report any such failure of performance to the Power of Origin; a sizable expansion was made in its specified functions and, correlatively, in its power of authority; provision was made for substitutes for Protecting Powers in order to ensure that prisoners of war would at all times benefit from the presence and activities of a Protecting Power, thus correcting the situation which had arisen all too frequently during

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[137] In Pictet, *Commentary* 611 the following remedial procedure is suggested: ". . .the Protecting Power will be able to check afterwards whether the prohibition of visits has been used by the Detaining Power to violate the Convention. In any event, it is not in the interests of the Detaining Power to misuse this reservation, because it would very soon be suspected of deliberately violating the Convention by evading supervision by qualified witnesses."

[138] Heckenroth, Puissances protectrices 229 (transl. mine).

World War II; and the use of the institution of the Protecting Power was extended not only to the redrafted First and Second Conventions, but also to the completely new Fourth Convention. These few examples alone demonstrate the great distance that had been traversed since 1907 when the Hague Regulations of that year contained no reference whatsoever to the Protecting Power.

In many respects the provisions of the 1949 Convention relating to the Protecting Power, like its provisions in other areas, represent compromises. Positions reached solely in order to bring about agreement between the extremes of opposing viewpoints can rarely be considered perfect, and the present case is no exception. However, it is better to have imperfect solutions which are acceptable to the great majority of States than to have perfect solutions which are acceptable to, and will be complied with by, only a few States. The provisions of the 1949 Convention relating to the Protecting Power unquestionably represent a great step forward in the evolution of the international law of war and would undoubtedly be viewed with amazement by even the most humanitarian of those who drafted the first Red Cross Convention in 1864, or even by those who had acted on behalf of the Protecting Powers as recently as 1914, at the beginning of World War I.

The Protecting Power is now a generally accepted and firmly established institution of international law. It is the subject of international agreements to which most of the States of the world are parties. It has been called upon to function during critical periods in recent world history and it has performed its mission in a satisfactory manner. It is foreseeable that in any future major international armed conflict it will be called upon by the belligerents to perform not only the missions specifically assigned to it in the 1949 Convention, but also numerous new functions on behalf of States at war.

C. THE PRISONERS' REPRESENTATIVE

1. Historical

The protective agency with which we shall now concern ourselves has come into being and evolved during little more than the past century as an institution of international law functioning uniquely in the prisoner-of-war area. Today it is known as the "prisoners' representative" in English and as the "*homme de confiance*" ("man of confidence") or "*représentant des prisonniers de guerre*" ("prisoners' representative") in French; but it has had many other titles.[139]

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[139] It has been known as the "spokesman," "man of confidence," "camp leader," "agent," "prisoners' representative," etc. *See* Maughan, *Tobruk* 781. The draft convention approved at Stockholm used the term "spokesman." Revised Draft Conventions 80–81. As late as 8 July 1949 the delegates at the Diplomatic Conference

The origin of the institution which has become the prisoners' representative can be traced to the Franco-Prussian War (1870–71) when the Prisoner-of-War Agency which the still very youthful ICRC had just brought into being[140] recommended to the military authorities of the belligerents—and the latter agreed—that one prisoner of war be designated as a "man of confidence" in each prisoner-of-war camp to be responsible for the receipt and distribution of collective relief supplies.[141] Despite the success of this innovation, the idea was not incorporated into either the 1899 or the 1907 Hague Regulations. However, it was widely adopted in the various World War I agreements,[142] and the prisoners' representative became an accepted fact which was duly institutionalized in Articles 43 and 44 of the 1929 Convention. Moreover, the functions of the office had broadened considerably since its initiation in 1870, no longer being confined to relief activities. Thus, Article 43 provided that the prisoners' representatice (therein termed the "agent") should be entrusted "with representing them [the prisoners of war] directly with military authorities and protecting Powers" as well as "with the reception and distribution of collective shipments."

Like any other wartime relationship, the prisoners' representative did not always operate as intended during World War II.[143] For example, some Detaining Powers disregarded the directive of the first paragraph of Article 43 that the prisoners of war should be allowed to "appoint" their own prisoners' representative ("agent").[144] However, as far as the prisoners of war themselves were concerned, the prisoners' representative was a definite success;[145] and the real-

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were still referring to the "spokesman" in their discussions. 2A *Final Record* 372–73, 380. The Draft Report of Committee II (Prisoners of War), distributed on 19 July 1949 (*ibid.*, 404), used the term "prisoners' representative" (*ibid.*, 570, 591–92), and that term thereafter remained in the Convention.

[140] 2 ICRC *Report* 5. *See also* note II-208 *supra*.

[141] Preux, Homme de confiance 449; 1 ICRC *Report* 342–43.

[142] Preux, Homme de confiance 450; 1 ICRC *Report* 343.

[143] The ICRC seems to have considered it improper that the transit camps in Great Britain did not have prisoners' representatives. *Ibid.* It is rather difficult to see how any Detaining Power could be expected to go through the formal procedure of having prisoners of war select prisoners' representatives in transit camps with their daily prisoner-of-war population shifts.

[144] American Prisoners of War 1; 1 ICRC *Report* 343.

[145] *Ibid.*, 345. One author has related an incident that occurred early during World War II when the general opinion among the prisoners of war was that the prisoners' representative was a rather useless office. As a result of an unsolved theft of German Government property, collective punishment consisting of loss of food for two days (a doubly prohibited penalty) was imposed on all of the prisoners of war at the camp where the theft had occurred, numbering some 20,000. The prisoners' representative complained to the camp commander and the collective punishment order was rescinded. "From that day we had a man who was our representative and in whom we placed our confidence." Tedjini, Témoinage 632

ization of this was undoubtedly a strong motivating factor in the further institutionalizing of the prisoners' representative as well as the further extensive broadening of his functions which are to be found in the 1949 Convention.[146]

2. Selection of the Prisoners' Representative

The first paragraph of Article 79, the introductory paragraph of the chapter of the 1949 Convention dealing with prisoners' representatives, is concerned with the manner of selecting these individuals, who are to represent the prisoners of war of their installation before the military authorities of the Detaining Power, the Protecting Power, the ICRC, and any other aid organization. They are to be "freely elected," the vote is to be by "secret ballot," an election is to be conducted every six months, or when a vacancy occurs, and the prisoners' representative is eligible for reelection. None of these provisions was to be found in the 1929 Convention. None of them would seem to present any serious problem of interpretation or application; but that problems can be created where none appears to exist has already been frequently demonstrated. Thus, the events in Korea demonstrated that when belligerents care little about the rule of law, or about what happens to their own personnel who have been captured, they can and will ruthlessly disregard any provisions of a humanitarian convention if they consider that their ultimate objective will be better served by such a procedure. The North Korean and Chinese prisoners' representatives in the prisoner-of-war camps maintained by the United Nations Command were interested in furthering the Communist political cause and not in ensuring the protection of their fellow prisoners of war.[147] And the selection of prisoners' representatives among the United Nations Command personnel in Communist prisoner-of-war camps, particularly those maintained by the Chinese, was a farce—but not a humorous one.[148] And while the practices in this regard in the prisoner-of-war camps maintained by the South Vietnamese was far from reaching the nadir of Communist practices, prisoners' representatives were frequently selected by the camp commander, rather than by the prisoners of war.[149]

(transl. mine). This article by a former French prisoner of war, himself a long-time prisoners' representative, gives a valuable insight into life in a prisoner-of-war camp in general (the author was a prisoner of war from June 1940 to May 1945) and the activities of a prisoners' representative in particular.

[146] The prisoners' representative is mentioned in 18 different articles and in two Annexes of the Convention.

[147] Vetter, Mutiny 65; UNC., Communist War 5–6.

[148] U.K., *Treatment* 16–17; Miller, *The Law of War* 246. The activities of some of these "progressive" prisoners' representatives were undoubtedly one of the reasons for the drafting and promulgation of Article IV of the *Code of Conduct.*

[149] *Vietnam, Article-by-Article Review,* Article 78.

There are not a few Powers among the present community of nations who consider it to be "democratic" to present the voter with a ballot containing no alternatives—in this case, with a single candidate, probably handpicked by the camp commander. Can it then be said that the prisoners of war are being permitted to "freely elect" their prisoners' representative? What if the camp commander rejects any candidate for prisoners' representative whom he considers "unfit," refusing to permit the name of any candidate to appear on the ballot unless the individual concerned has previously demonstrated his willingness to "collaborate" with the camp authorities? Could the candidate who emerges successfully from this type of screening be "entrusted with representing" the prisoners of war in disputes with the camp authorities concerning the conditions of captivity? Is a ballot "secret" when the military authorities of the Detaining Power insist upon examining it before it is placed in the ballot box? All of these procedures were followed by the Chinese Communists in Korea.[150] And, unfortunately, there is no reason to believe that they will not be the manner in which prisoners' representatives will be selected in any future major international armed conflict involving like-minded nations as belligerents.

However, we must assume that the governments of the large majority of States that are Parties to the 1949 Convention are law-abiding and will apply the provisions of the Convention in good faith, and that practices such as those adopted by the Chinese Communists in Korea will be the exception rather than the rule. Based upon that assumption, any prisoner of war may be a candidate for election as the prisoners' representative at the installation in which he is confined; the prisoners of war of that installation will cast their secret ballots for the candidate of their choice; and the candidate receiving the greatest number of votes will be elected.[151] At this point the Detaining Power may legally impose its will upon the election—but only negatively. Under the provisions of the fourth paragraph of Article 79 the successful candidate for prisoners' representative may not assume his functions in that capacity until he has been approved by the Detaining Power.[152] If the Detaining Power refuses to approve him, it would appear, although it is not specifically so provided, that

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[150] *See* note 148 *supra*.

[151] If the prisoners' representative so elected is not the ranking individual in the prisoner-of-war camp, acceptance of his status by the other American servicemen in the camp might well be a violation of Article IV of the *Code of Conduct*. *See* the *Instructional Material* for this article of the Code.

[152] It should be noted that this requirement of approval of the prisoners' representative by the Detaining Power applies only to one who is elected and that it therefore does not apply to the prisoners' representative who obtains his office by virtue of being the senior officer present. *See* text in connection with note 156 *infra*.

the prisoners of war would have no alternative but to continue to conduct elections until an individual acceptable to the Detaining Power has been elected. By this method a Detaining Power probably could, eventually, bring about the election of a collaborator just as successfully as it could by improperly controlling the names which appear on the ballot. That is, of course, basically the same problem which was encountered with respect to the provisions of the first paragraph of Article 8 that require Detaining-Power approval of the representatives of the Protecting Power.[153] There is one additional safeguard here against arbitrary action by the Detaining Power—if it refuses to approve and accept the elected prisoners' representative, it is required to advise the Protecting Power of the reason for such action.[154] However, the Protecting Power is apparently so advised for informational purposes only, as the Convention does not authorize it to take any action even if it considers the reason given by the Detaining Power to be totally without basis. Nevertheless, the need to advise the Protecting Power of its disapproval and of the reason therefor should constitute at least a small brake on completely arbitrary action by the Detaining Power and will, in some cases, undoubtedly inhibit repetitive arbitrary disapprovals of the individual chosen by his fellow prisoners of war to be their representative in dealing with the Detaining Power.

The election of a prisoners' representative just discussed refers to a prisoner-of-war installation in which no officers are confined. The second paragraph of Article 79 covers the other two possibilities: camps where there are only officers; and camps where there are both officers and enlisted men.[155] In either such case, the senior officer present is automatically the prisoners' representative.[156] If there are only officers in the camp, one or more "advisers" are to be "chosen" by the other officer prisoners of war; if it is a mixed camp, with

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[153] *See* p. 278 *supra*.

[154] This resembles the procedure which was originally included in, but was deleted from, the first paragraph of Article 8. *See* note 74 *supra*.

[155] Retained medical personnel and chaplains are not prisoners of war (*see* pp. 71–72 *supra*) and are, therefore, not included under these provisions. Subparagraph (b) of Article 33 places upon the senior medical officer in a camp the duties with respect to retained medical personnel, officer and enlisted, that the prisoners' representative has with respect to prisoners of war. Chaplains act individually on behalf of themselves only. Like the senior medical officer, each has access to the camp commander. Pictet, *Commentary on the First Convention* 249–50; U.S. Army Regs. 633–50, para. 32e.

[156] Apparently some question arose as to whether this was so under the last paragraph of Article 43 of the 1929 Convention, as that Article used the term "intermediary" for the senior officer present, rather than the term "agent," used throughout that Convention to signify what we now call the prisoners' representative. Preux, Homme de confiance 457; 1 ICRC *Report*, 346; Rich. Brief History 398. The wording of the second paragraph of Article 79 clarifies the former am-

both officers and enlisted men, one or more "assistants" are to be "elected" by the latter.[157]

There is one set of circumstances under which the senior officer present will not necessarily be the prisoners' representative. The third paragraph of Article 79 provides that officer prisoners of war of the same nationality as the enlisted prisoners of war constituting a labor detachment shall be assigned to such detachments to perform the necessary administrative duties and that these officers "may be elected as prisoners' representatives." In other words, even though the labor detachment will, to a certain extent, be a "mixed" camp, the senior officer detailed to it to perform the administrative details will not automatically be the prisoners' representative, but he will be eligible for election to that office.[158]

The prisoner of war who is elected prisoners' representative or who occupies such office by virtue of his seniority of rank must, of course, be one who is interned in the prisoner-of-war installation in which he is to function as prisoners' representative. The last paragraph of Article 79 establishes certain other qualifications that must be met: he must always have "the same nationality, language and customs as the prisoners of war whom he represents." Inasmuch as the third paragraph of Article 22 provides that prisoners of war are to be assembled in camps or camp compounds according to the same three criteria,[159] this should cause no particular problems. Moreover, if prisoners of war with different nationalities, languages, and customs are confined in different compounds in the same prisoner-of-war

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biguity. The senior officer present is specifically stated to be the prisoners' representative. One author sees a conflict of interest for this officer between the requirements of the Convention (to further the welfare of his fellow prisoners of war) and those of the Code of Conduct (to defeat the enemy). Smith, Code of Conduct 112. Such a situation would certainly seem to have the same reprehensible characteristics as those attributed to the Communist prisoners' representatives in the United Nations Command camps in Korea. *See* text in connection with note 147 *supra*.

[157] The functions of the "advisers" and the "assistants" are probably intended to be identical, the difference in terminology being a recognition of the military hierarchy. Preux, Homme de confiance 457. Preux also explains the use of the word "chosen" for the officers instead of the word "elected" used for the enlisted men as being the result of a desire to avoid imposing the formality of an election on the officers. *Ibid.*, 458. Presumably the officers would make their choice by some type of consensus.

[158] *Ibid.*, 459. If an officer is elected prisoners' representative, his assistants must be enlisted men.

[159] *See* p. 175 *supra*.

camp,[160] each compound is to have its own prisoners' representative, so that each such prisoners' representative will meet the stated qualifications.[161]

There are two methods by which a Detaining Power may rid itself of a prisoners' representative whom it finds to have gadfly characteristics—dismissal[162] and transfer. Article 81 envisages the possibility that a Detaining Power may dismiss a prisoners' representative inasmuch as its last paragraph provides that in such an event the Protecting Power must be informed of the reasons therefor.[163] As is the case when the Detaining Power conveys to the Protecting Power the reason for its refusal to approve a prisoners' representative who has been elected, the Convention merely calls for the communication of the information and does not authorize the Protecting Power to pass on the merits of the action. Of course, the dismissal would mean that a vacancy existed and, under the first paragraph of Article 79, this would necessitate a new election.

The fifth paragraph of Article 81 foresees situations in which the prisoners' representative may be transferred away from the prisoner-of-war camp in which he is performing his functions. If he is so transferred, he ceases to occupy the position of prisoners' representative. This is obviously a simple way for the Detaining Power to

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[160] The last paragraph of Article 79 refers to "different sections of the camp," while the third paragraph of Article 22 refers to "camp compounds." The latter is the technical term properly applied to the subdivisions of a prisoner-of-war camp. (It might also be noted that both the third paragraph of Article 22 and the first sentence of the last paragraph of Article 79 used the terminology "nationality, language *and* customs" (emphasis added), while the second sentence of the last paragraph of Article 79 substitutes an "or" for the "and" in both the English and the French versions of the Convention. Obviously, the use of the disjunctive in this instance was intentional.)

[161] This practice had, apparently, been followed by at least some Detaining Powers during World War II. *See, e.g., German Regulations*, No. 22, para. 266. It would seem to eliminate the problem involving the United States Code of Conduct that might arise in a camp with prisoners of war from the United States armed forces if the senior officer in the camp were from the armed force of another Power of Origin. *But see* Manes, Barbed Wire Command 17.

[162] Although the Convention is silent on the subject, it is not believed that the Detaining Power could dismiss an officer prisoners' representative of a prisoner-of-war camp, as he would continue to be the senior officer present and there is no provision for anyone other than the senior officer to be the prisoners' representative in a camp with either an all-officer or a mixed prisoner-of-war population.

[163] In the debriefing which occurred after the repatriation of prisoners of war at the end of World War II, a former prisoner of war from Stalag 2B (in Germany) stated that after he had served as the camp prisoners' representative for almost a year, the Germans refused to deal further with him as prisoners' representative when they discovered that he was Jewish. American Prisoners of War 55. It would appear that there is no provision of the 1949 Convention which would prohibit this from being given by a Detaining Power to a Protecting Power as the "reason" for the dismissal of a prisoners' representative.

rid itself of a prisoners' representative whom it considers "undesirable," as it need not even devise a reason to give to the Protecting Power. The only limitation on its right to take this action is the requirement that it must give the prisoners' representative sufficient advance notice of the proposed transfer to allow him a reasonable period of time in which to brief his successor with regard to current problems.

Reference has been made to the selection of officer advisers or enlisted assistants when the prisoners' representative is an officer. Apart from these, Article 81 provides in its second paragraph that the prisoners' representative may himself select such additional assistants as he may require. Although the Convention does not mention the Detaining Power in this regard, it may be assumed that the latter will have some veto power if it decides that the prisoners' representative is attempting to use too many prisoners of war as assistants, particularly because, as we shall see, the prisoner's representatives and all of his assistants are paid out of canteen funds or, if there are none available, then by the Detaining Power.[164]

One aspect of the provisions dealing with the subject of the designation of prisoners' representatives is somewhat confusing. The second paragraph of Article 56 provides that labor detachments "shall remain under the control of and administratively part of a prisoner of war camp"; yet the third paragraph of Article 79 indicates that "labor camps"[165] are to have their own prisoners' representatives. It has been suggested that the prisoners' representative in the labor detachment represents the other prisoners of war of that detachment vis-à-vis the detachment commander, while the camp prisoners' representative represents them vis-à-vis the camp commander when a problem is not resolved at the lower level.[166] This is probably as good a solution as can be devised, even though the labor detachment prisoners' representative is not designated as an assistant to the camp prisoners' representative by the Convention. Moreover, such a system of hierarchical echelons would definitely not be applicable to the prisoners' representative of the various compounds containing prisoners of war of different nationality, language, and customs selected pursuant to the fifth paragraph of Article 79, each of whom would be of

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[164] *But see* Preux, Homme de confiance 469–70. He believes that, while the Detaining Power may express its displeasure at the number of assistants designated by the prisoners' representative, the final decision is to be made by the latter.

[165] This is apparently just another instance of careless draftsmanship. There is no doubt that it refers to the "labor detachments" of Article 56.

[166] Preux, Homme de confiance 456. The fourth paragraph of Article 81 indirectly supports this interpretation as it provides that communications between the prisoners' representative in the labor detachment and the prisoners' representative of the principal prisoner-of-war camp are not to be included in the personal mail quotas established under the first paragraph of Article 71.

equal stature and equally entitled to direct access to the camp commander and to the representatives of the Protecting Powers.

3. Functions of the Prisoners' Representative

The prisoners' representative has three major functions and a myriad of less important ones. The major functions are (1) representing the prisoners of war before the military authorities, the Protecting Power, the ICRC, and other similar organizations [Article 79, first paragraph]; (2) furthering their physical, spiritual, and intellectual well-being [Article 80, first paragraph]; and (3) supervising their organization for mutual assistance and collective relief [Article 80, second paragraph].[167]

The third paragraph of Article 81 authorizes a prisoners' representative to visit all premises where prisoners of war are detained. Obviously, this provision refers to premises constituting a part of the prisoner-of-war installation of which he is the prisoners' representative. Moreover, this same paragraph provides that all prisoners of war (of the particular installation) must be permitted to consult freely with the prisoners' representative;[168] and they are authorized, by the second paragraph of Article 78, to submit complaints concerning the conditions of their captivity to the prisoners' representative for transmittal to the Protecting Power. To reinforce this latter provision, the first paragraph of Article 126 requires that the Protecting Power be permitted to interview the prisoners' representative without witnesses; and the clear implication of the second paragraph of Article 126 is that this may be done as often as the Protecting Power desires. Of course, by this method the prisoners' representative will be in a position to present to the representative of the Protecting Power not only the complaints formally submitted to him for transmittal, but also those which he has received informally, as well as any that he desires to make himself, particularly as, in his capacity

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[167] The first paragraph of Article 80 assigns to the prisoners' representative the broad function of furthering "the physical, spiritual and intellectual well-being of prisoners of war." Preux believes that the three major functions of the prisoners' representative are relief activities, relations between the prisoners of war and the military authorities, and supervision of the application of certain guaranties expressly provided by the Convention. *Ibid.*, 464. The present author would, for the most part, include the last function enumerated by Preux under the major function of representing the prisoners of war before the military authorities. U.S. DA Pam 27-161-2, at 84, has still a third list of the functions of the prisoners' representative.

[168] In an attempt to preclude a recurrence of one situation noted during World War II that left certain prisoners of war with virtually no channel of complaint concerning the conditions of their captivity, frequently very bad, the second paragraph of Article 57 specifically provides that prisoners of war employed by private individuals or concerns shall have the right to communicate with and to receive communications from the prisoners' representative of the prisoner-of-war camp to which they are administratively assigned. (*See* p. 246 *supra*.)

as prisoners' representative, he will usually be aware of all that is transpiring in the camp.[169] When the information that he has thus received and the inquiries that he has made indicate that the Detaining Power is not complying fully with the provisions of the Convention, the prisoners' representative may conclude that the particular violation is of a nature that can be corrected by bringing it to the attention of the camp commander; or he may decide that it is of a nature that requires that it be brought to the attention of the Protecting Power.[170] If he follows the former path, only to learn that the camp commander denies that the procedure objected to constitutes a violation of the Convention, or that he refuses to take any action (perhaps because the condition objected to has been specifically ordered by higher military authority of the Detaining Power), the prisoners' representative would clearly have no alternative but to pass the complaint on to the representative of the Protecting Power under the authority contained in the last paragraph of Article 78.

The second paragraph of Article 41 provides that all regulations, orders, notices, and publications issued by the Detaining Power and pertaining to prisoners of war must not only be posted in the prisoner-of-war camps in a language which the prisoners of war understand, but that copies must be furnished to the prisoners' representative. He is thus in a position to ensure that the contents of such documents are in accord with the Convention and that the prisoners of war are actually made aware thereof. Moreover, he then has a file of all such documents and will be in a position to intervene to ensure that prisoners of war are not punished for the violation of a rule which has not been properly promulgated by posting and delivery to the prisoners' representative, or where the violation occurred before the rule was properly so promulgated.

As we have seen, the first paragraph of Article 79 bestows upon the prisoners' representative the function of representing the prisoners of war "before the military authorities." There can be no question that the camp commander and his subordinates come within this terminology—but what of the higher military authorities of the Detaining Power, right up to the Ministry of Defense itself? One author considers in inconceivable that a camp prisoners' representative should communicate directly with the military authorities of the Detaining Power superior to the camp commander.[171] There is

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[169] During World War II the prisoners' representative is stated to have had the tasks of "forwarding of petitions and complaints, making of enquiries, and collecting of information." 1 ICRC *Report* 344.

[170] Of course, he should winnow out the complaints which are without basis, as the submission of groundless complaints merely detracts from the weight given to valid ones. *Ibid.*, 345.

[171] Preux. Homme de confiance 456.

considerable merit to this view. However, the fourth paragraph of Article 81 provides that the prisoners' representative must be accorded facilities for "communication by post and telegraph with the detaining authorities."[172] Surely, the draftsmen of the Convention did not believe that the prisoners' representative had a need for these facilities merely in order to communicate with the camp commander of his own prisoner-of-war camp. It would thus appear that the prisoners' representative has at least an implied right to communicate directly with any level of the military authorities of the Detaining Power;[173] but it would also appear that when he is unable to obtain satisfaction from the camp commander he would be well advised to channel his resort to higher authority through the Protecting Power, rather than to use the implicit right of direct communication.

During World War II the German military authorities ordered that, in general, all searches of prisoner-of-war quarters for security purposes should be accomplished in the presence of the prisoners' representative or his equivalent.[174] This appears to fall within the category of relations with the military authorities and is a logical function of the prisoners' representative. On the other hand, the United States issued an order making the prisoners' representative ("spokesman") responsible for the "maintenance and cleanliness of the quarters."[175] This does not appear to be the type of function which should be assigned to the prisoners' representative.[176]

It is, perhaps, appropriate to mention at this point several of the provisions of the Convention that were included in order to protect the prisoners' representative and to facilitate his mission. Thus, the first paragraph of Article 81 provides that he is not to be required to perform any other work if to do so will make the accomplishment of his mission more difficult. Inasmuch as the functions of the prisoners' representative in most prisoner-of-war camps will be full time, not only for the prisoners' representative himself but also for his assistants, this position will normally mean that he should not be

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[172] In explaining this provision at the 1949 Diplomatic Conference, the representative of the ICRC referred to its provisions for communicating "with the Protecting Power and the various relief organizations," pointedly omitting any reference to the fact that the "detaining authorities" were also mentioned therein. 2A *Final Record* 289—90.

[173] U.S. Army *Regs.* 633–50, para. 32, provides that postal and telegraph facilities will be made available to the prisoners' representative for the purpose of communicating with, among others, "United States Army authorities." This certainly appears to refer to military authorities at a higher level than the camp commander.

[174] *German Regulations*, No. 44, para. 811.

[175] *POW Circular No. 1*, para. 44.

[176] It must be borne in mind that the prisoners' representative has no disciplinary powers, all such powers residing exclusively in the Detaining Power. *See* the third paragraph of Article 96. *See also German Regulations*, No. 32, para. 511; U.S. Army *Regs.* 633–50, para. 32k.

required to perform any other work.[177] The third paragraph of Article 80 provides that the prisoners' representative may not be held responsible *ex officio* for offenses committed by other prisoners of war. This is particularly relevant with respect to incidents such as the construction of a tunnel to be used for the purpose of escape. The military authorities of the Detaining Power will probably assume, and with some justification, that this could not have occurred unknown to the prisoners' representative—but whether he knew of it or not, he is not to be held responsible if he did not personally participate in it.[178]

We have just seen that a prisoners' representative may appoint the assistants that he considers necessary and that he may visit all of the premises constituting a part of the prisoner-of-war installation of which he is the prisoners' representative. In order that he be physically able to exercise this right of visitation, the second paragraph of Article 81 requires the Detaining Power to grant him "a certain freedom of movement" so that he may visit labor detachments under his jurisdiction, as well as the points at which relief supplies are received, warehoused, issued, etc. The fourth paragraph of Article 81 not only instructs the Detaining Power to facilitate the prisoners' representative's efforts to communicate by post and telegraph with the military authorities, the Protecting Power, the ICRC, the Mixed Medical Commissions, and other aid organizations,[179] but also that such communications are not to be counted against the personal mail quotas established under the first paragraph of Article 71.[180]

Finally, the third paragraph of Article 62 provides that the prisoners' representative, his advisers, and his assistants shall receive their working pay[181] out of the canteen fund, with the prisoners' represen-

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[177] In officers' camps and in mixed camps this will present no problem, as the senior officer present will be the prisoners' representative and officers may not be compelled to work. *See* p. 224 *supra*. If an officer is elected prisoners' representative of a labor detachment, he will probably be required to continue to work, both because his official duties should not be that onerous and because he was specifically assigned to the detachment to perform necessary administrative functions (for which he had, presumably, volunteered).

[178] This is another prohibition of vicarious punishment in a specific instance. For the general prohibition of collective punishment, *see* Article 87, third paragraph.

[179] Note the difference between the enumeration set forth here and that set forth in the first paragraph of Article 79. *See* p. 295 *supra*. Concerning the Mixed Medical Commissions, see pp. 411-412 *infra*.

[180] It is possible to interpret the provision concerning mail quotas as being applicable only to communications between the prisoners' representative of a labor detachment and the prisoners' representative of the principal prisoner-of-war installation. However, it is believed that the broader interpretation given in the text is not only more logical but that it is supported by the legislative history. *See* 2A *Final Record* 405.

[181] Concerning "working pay," see pp. 201–205 *supra*.

tative himself setting the scale of such payments, subject to the approval of the camp commander. Should there be no canteen fund, then the Detaining Power is required to pay these individuals "a fair working rate of pay." No provision is made as to how the fair working rate of pay is to be set, so it appears that the Detaining Power would make that decision. It certainly could not establish a scale of pay for the prisoners' representative and his staff that was less than that established for the prisoners of war generally under the first paragraph of Article 62.[182]

With respect to the prisoners' representative's function of furthering the physical, spiritual, and intellectual well-being of the prisoners of war, established by the first paragraph of Article 80 of the Convention, there is little to say. All of the discussions of the activities of the prisoners' representative during World War II agree that the prisoners' representatives were extremely active and successful in this field, organizing sports, orchestras, and theatricals, establishing camp libraries and publications, arranging for educational facilities, and sometimes even acting in a spiritual capacity.[183]

It will be recalled that the office of the predecessor of the prisoners' representative, the "man of confidence," was specially created for the purpose of providing a reliable prisoner of war who would supervise the organization of the prisoners of war for mutual assistance and collective relief.[184] Under the provisions of the second paragraph of Article 80 this remains one of the major functions of the prisoners' representative. The second paragraph of Article 73 states specifically that even a special agreement between the belligerents cannot affect the prisoners' representative's function of taking possession of all collective relief shipments and of distributing them or otherwise disposing of them in the interests of the prisoners of war.[185] Annex III to the 1949 Convention, entitled *Regulations concerning Collective Relief*, contains the detailed rules with respect to the receipt, warehousing, distribution, and other disposal of collective relief supplies that are to apply in the absence of a special agreement. In all aspects of this matter, the prisoners' representative has both the responsi-

[182] During the discussion of pay for prisoners' representatives in the Subcommittee of Financial Experts at the 1949 Diplomatic Conference, it was suggested that if the prisoners' representative were to be paid by the Detaining Power, the latter might be able to use this as a source of pressure on the former. 2A *Final Record* 541. Nevertheless, the alternative method of payment adopted is exactly the one concerning which the warning was issued.

[183] 1 ICRC *Report* 344–45; Preux, Homme de confiance 462, 470; Tedjini, Témoinage 633.

[184] *See* p. 294 *supra*.

[185] Article 125, fourth paragraph, requires the prisoners' representative to furnish a receipt for relief supplies received from relief organizations. This gives some assurance to the donors that the supplies donated actually reached the prisoners of war and were not intercepted and used by the Detaining Power.

bility and the power for the handling of all collective relief supplies at his prisoner-of-war camp.[186]

The various functions of the prisoners' representative that we have just discussed are those that he exercises on behalf of the entire prisoner-of-war population of the prisoner-of-war installation that he represents. In addition, there are many functions that he exercises on behalf of individual prisoners of war. Thus, under the third paragraph of Article 48 he will ensure that the personal (and community) property that prisoners of war, transferred from his prisoner-of-war camp to another one, were unable to take with them because of the weight limitations contained in the preceding paragraph of Article 48, is forwarded to them; under Annex V, implementing the third paragraph of Article 63, he countersigns, with the prisoner of war concerned, the notification of the transmittal of funds abroad from the personal account of the prisoner of war;[187] under the first paragraph of Article 65 he countersigns entries in the account of a prisoner of war on behalf of the individual concerned; under the fourth paragraph of Article 96 he must be advised of any disciplinary punishment pronounced against a prisoner of war;[188] under the last paragraph of Article 98 he is to be given custody of parcels and remittances of money addressed to individual prisoners of war who are undergoing confinement as a disciplinary punishment, and he is given the authority to donate any perishable items contained in such parcels to the camp infirmary; under the last paragraph of Article 104 he is to receive the same advance notice of the Detaining Power's intention to institute judicial proceedings against a prisoner of war that the Protecting Power receives;[189] under the first paragraph of Article 107 he is to receive the same notice of a judgment and sentence pronounced upon a prisoner of war, and of appellate rights, that the Protecting Power receives;[190] and under the last paragraph of Article 113 he has the right to be present at the examination by a Mixed Medical Commission of any prisoner of war who presents himself for that purpose.[191]

It is obvious that the many functions delegated to the prisoners' representative reach into every activity in the prisoner-of-war camp affecting the prisoners of war. The extent of the impact of his activities upon the daily life of the prisoners of war is incalculable. An efficient prisoners' representative can literally mean the difference between survival or death for the prisoners of war confined in camps

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[186] Concerning relief supplies generally, see pp. 158–163 *supra.*

[187] Concerning the transmittal of funds abroad, see pp. 207–208 *supra.*

[188] *See* p. 325 *infra.*

[189] *See* note V-85 *infra.*

[190] *See* p. 338 *infra.*

[191] *See* p. 412 *infra.*

maintained by some Detaining Powers. While using common sense and carefully selecting his fields of battle, he must be prepared to challenge any action of the Detaining Power, or its representatives, that he considers to be a violation of the provisions of the Convention and contrary to the best interests of the prisoners of war. The strong and competent prisoners' representative will quickly win the confidence of the prisoners of war whom he represents and the respect of the prisoner-of-war camp commander and his staff. When he has accomplished this, he has already done much to improve the lot of the prisoner-of-war population of the camp of which he is the prisoners' representative.

D. THE INTERNATIONAL COMMITTEE OF THE RED CROSS

1. Historical

The International Committee of the Red Cross (ICRC) came into being as a result of the fact that Henri Dunant, a Swiss civilian, was a witness to the postbattle horrors resulting from the battle of Solferino (June 1859) between the Austrians and the Allies (primarily the French). Approximately 40,000 of the 300,000 men who participated in that battle were killed or wounded during its course of little more than 12 hours—and, subsequently, there were thousands of additional deaths from among the participants, many of them because of the lack of any system of organized medical care.[192] In November 1862 Dunant's book, *Souvenir de Solferino* (Memory of Solferino) was published in Geneva; in February 1863 the "Committee of Five," the genesis of the ICRC, was created by the Geneva Public Welfare Society; an International Conference, called by the Committee of Five, met in Geneva in October 1863; and on 22 August 1864, less than two years after the publication of Dunant's book, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field had been drafted and signed by a Diplomatic Conference called by the Swiss Government.[193] This was the first of the long series of humanitarian Geneva Conventions which culminated in the four Geneva Conventions of 1949.[194]

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[192] For the story of this episode and its humanitarian repercussions, see generally Gumpert, *Dunant—the Story of the Red Cross.*

[193] All of the major European and several American States had been invited to participate in the Diplomatic Conference. The United States, then engaged in the American Civil War, was represented by an observer. It did not ratify the 1864 Convention until 1882.

[194] The national delegates to the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which met in Geneva in 1974, 1975, 1976, and 1977, signed a Final Act on 10 June 1977 and signed a Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (herein referred to as the 1977 Protocol I) on 12 December 1977.

Despite the first word in its title, the ICRC is not international (except in its outlook). Its headquarters are located in Geneva; its membership is exclusively Swiss in nationality; and it maintains this membership by co-option. Not a little of the success of the ICRC may undoubtedly be attributed to the fact that, since the Congress of Vienna, Switzerland has existed under a state of perpetual neutrality which, unlike that of certain other small European states less fortunate from the point of view of geography, has been maintained. This has ensured the ICRC not only the fact of neutrality, but an aura of neutrality, a situation that would have been impossible had it been based in any other country of today's world.

Traditionally, the delegates of the ICRC have been found wherever there have been victims of disaster, natural or man-made. Earthquakes, floods, droughts, and armed conflicts, international or internal, all produce human victims; and all quickly bring an offer of assistance from the ICRC. We shall, of course, inquire into only its activities on behalf of prisoners of war in international armed conflict.

2. The Position of the ICRC in International Armed Conflict

Article 9 of the 1949 Convention contains the basic international recognition of the ICRC and its activities on behalf of prisoners of war. It states:

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross . . . may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.

It will be noted that this Article follows immediately after the basic Article with regard to the Protecting Power. This positioning was unquestionably intentional. During World War II it was sometimes necessary for the ICRC to exert great effort in order to overcome the impression of some belligerents that it was attempting to duplicate the functions of the Protecting Power. While it did, for the most part, succeed in convincing them that such was not the case[195]—by placing the two basic provisions of the Convention relating to the Protecting Power and the ICRC in such juxtaposition, and by the phraseology used—the 1949 Diplomatic Convention clearly indicated its expectation and intent that the two institutions could, without any interference in each other's activities, function side by side.[196]

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[195] 1 ICRC *Report* 39.

[196] Unquestionably, many of their activities are identical—but this was understood and intended. How else can we explain a provision such as that contained in the last paragraph of Article 126 that specifically gives to the ICRC delegates "the same prerogatives" of visitation of prisoner-of-war installations as the first two paragraphs of Article 126 give to the representatives of the Protecting Power?

Moreover, recognizing the very real possibility of a shortage of states available to act as Protecting Powers in any future major international armed conflict, the first paragraph of Article 10 authorizes the belligerents "to agree to entrust [the duties of the Protecting Power] to an organization which offers all guaranties of impartiality and efficacy."[197] The ICRC is unquestionably such an organization; and, as has already been noted, it has formally announced that, contrary to the position previously taken by it, it will in the future consider accepting an invitation to act in that capacity.[198]

Furthermore, the second paragraph of Article 10 provides that, absent a Protecting Power or an organization designated under the first paragraph of that Article, the Detaining Power may designate a neutral Power, or such an organization as mentioned above, to perform the functions of a Protecting Power.[199] The ICRC, of course, likewise meets the requirements for designation under this provision. And the third paragraph of Article 10 provides that when the Detaining Power is unsuccessful in obtaining the required services under the second paragraph of Article 10, it may request or accept "the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by the Protecting Power."[200]

From the foregoing it is clear that it was the hope of the 1949 Diplomatic Conference that the Protecting Power and the ICRC would function simultaneously, supplementing each other, in order to provide the prisoners of war with the maximum protection and service; but that should there for any reason fail to be a Protecting Power, it was intended that the ICRC—or another similar organization, if such there be—should fill the vacuum and perform either all of the functions of a Protecting Power, or, at least, all of its humanitarian functions, if any of its functions were deemed not to fall within that category.[201]

3. Activities of the ICRC

As we have seen, the provisions of the first two paragraphs of Article 126 authorize the representatives of the Protecting Power to visit all places where prisoners of war may be and give them wide

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[197] *See* note 58 *supra.*

[198] *See* note 59 *supra.*

[199] *See* p. 271 *supra.*

[200] As has been seen (see note 43 *supra*), the ICRC has now reached what is believed to be the correct conclusion that all of the functions of the Protecting Power are basically humanitarian in nature. It had previously felt differently. *See* notes 59 and 60 *supra.*

[201] When the ICRC, or any other organization, acts pursuant to either of the first three paragraphs of Article 10, it does so as a substitute for a Protecting Power, not as an actual Protecting Power which, by definition, must be a State. *See* note 2 *supra.*

latitude in performing this function.[202] The fourth paragraph of that Article provides that the ICRC delegates "shall enjoy the same prerogatives."[203] All that has been said in this respect with regard to the representatives of the Protecting Power is equally applicable to the delegates of the ICRC. That the ICRC performed this function, and performed it vigorously, is evidenced by the statistics—during World War II ICRC delegates made a total of 11,175 visits to installations where prisoners of war and civilian internees were confined.[204] During their visits the delegates of the ICRC, like the representatives of the Protecting Power, have the right to interview prisoners of war and without witnesses.[205] They will thus learn of the complaints of the prisoners of war concerning the conditions of their captivity.[206] In addition to this parallel right of visitation,[207] the ICRC delegates are also given a parallel right of access to the prisoners' representative.[208] While the prisoners' representative can, and probably will, on occasion, advise the delegates of the ICRC of deficiencies in the conditions of captivity,[209] this is probably not the principal reason for giving the

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[202] *See pp.* 281–284 *supra.*

[203] See note 196 *supra.* That paragraph also provides, like the last sentence of the first paragraph of Article 8 concerning the "delegates" of the Protecting Power, that ICRC delegates must be approved by the Detaining Power.

[204] 1 ICRC *Report* 83. During and after the Sino-Indian War (1962), the People's Republic of China gave another example of its ability to disregard, or to misinterpret in its own interest, the clearest possible provisions of international agreements voluntarily entered into by it. Despite the unambiguous provisions of the last paragraph of Article 126, the PRC took the position that this article did not apply to the ICRC! Draper, People's Republic 366. *See also* note 47 *supra.*

[205] A general statement of the procedure followed by an ICRC delegate during and after a visit to a prisoner-of-war installation is presented in Anon., The Protection of Prisoners of War. 14 *I.R.R.C.* 191.

[206] This right of the ICRC to interview prisoners of war without witnesses and to receive complaints was contested by some Detaining Powers during World War II. 1 ICRC *Report* 342. Of course, there was no specific provision such as the last paragraph of Article 126 in the 1929 Convention. However, these functions were performed by the ICRC during World War II. *See, e.g., ibid.,* 346; and *POW Circular No. 1,* para. 99. Although the ICRC is not mentioned in the second paragraph of Article 78, concerning complaints, it is somewhat difficult to visualize what else the ICRC delegate and the prisoner of war are going to discuss in the private interviews that the last paragraph of Article 126 certainly authorizes.

[207] The right of visitation includes not only the prisoner-of-war camp, but "all places where prisoners of war may be." For several other places specifically mentioned in the Convention, *see* note 87 *supra.*

[208] The first paragraph of Article 126, the fourth paragraph of Article 126, and the first paragraph of Article 79, and the fourth paragraph of Article 81 all authorize communication between the prisoners' representative and the ICRC delegates.

[209] After almost a decade and a half of additional study of the subject, the author is inclined to be a little less sure that the legislative history of the second paragraph of Article 78 establishes that the ICRC delegates are not authorized recipients of prisoner-of-war complaints. *See* Levie, Prisoners of War and the Protecting Power, 55 *A.J.I.L.* 374, 395–96, and particularly note 55 therein. As indicated

prisoners' representative and the delegates of the ICRC a mutual right of access. It will be recalled that the position which we now denominate the "prisoners' representative" was originally brought into existence for the purpose of supervising prisoner-of-war relief matters.[210] It is undoubtedly in this area that the need for communication between the prisoners' representative and the delegates of the ICRC will be most needed and most useful. A very considerable part of the time of the ICRC delegates will be occupied with the extremely important function of ensuring that relief supplies, both from neutrals and, at times, from the Power of Origin, reach the prisoner-of-war camps where they are most needed and are thereafter properly distributed. The provisions of the Convention having to do with relief matters uniformly place the ICRC on the special footing which it rightly deserves because of its traditional major interest in such matters.[211]

The procedure followed by the ICRC in its relations with the opposing belligerents differs in one very material respect from that of the Protecting Powers—unlike the latter, who submit the reports of their visits to the Power of Origin only,[212] the ICRC submits its reports to both the Power of Origin and the Detaining Power;[213] in fact, if there is another Power concerned, as where the Capturing Power has transferred the custody of the particular prisoners of war to another Detaining Power, such Capturing Power will also receive a copy of the ICRC report.[214] There is much to be said for this practice.[215]

It has already been mentioned that the ICRC originally conceived and executed the idea which brought into being the Central Prisoners of War Information Agency.[216] Its continued interest and usefulness in this respect has been recognized in the first paragraph of Article 123, authorizing the ICRC to propose to the belligerents (as it has done in the past) that such an Agency be organized. It may be as-

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in the text here, it was probably not the principal reason for providing for communication between the prisoners' representative and the ICRC—but the ICRC has traditionally performed the function of receiving complaints without a legislative directive and the new guarantee of access in private practically ensures that it will continue to do so.

[210] *See* p. 294 *supra.*

[211] See, e.g., Articles 125; 72; 73; the first two paragraphs of Article 75; and Annex III, Article 9. For a review of ICRC relief activities during World War II, *see* 3 ICRC Report, *passim.*

[212] *See* p. 284 *supra.*

[213] 1 ICRC *Report* 240–41; Rich, Brief History 489.

[214] 1 ICRC *Report* 241. Among their other improper actions, during World War II the Japanese insisted on censoring the copy of the reports sent by the ICRC to the Power of Origin. *Ibid.*, 229. A censored report has, of course, little significance.

[215] A detailed outline of the matters covered by the report may be found at 1 ICRC *Report* 233–38.

[216] *See* p .154 *supra.*

sumed that, in any future major international armed conflict, not only will the ICRC propose the organization of this central clearinghouse of information,[217] but that it will, as it has in the past, assume the responsibility for the establishment and operation thereof.[218]

The ICRC is a unique organization which has played an indispensable humanitarian role in every armed conflict for more than a century. There is every reason to believe that, if permitted to do so by the belligerents, it will continue to play such a role in future armed conflicts, making the life of prisoners of war on both sides more livable and, in many cases, being the major reason for the survival of prisoners of war. It remains to be seen whether the ICRC will be permitted to perform the functions envisaged for it by the 1949 Diplomatic Conference, as it has been in the majority of cases, or will be denied the right to perform any of these functions, as it was by the Soviet Union (1940–45),[219] North Korea (1950–53),[220] the People's Republic of China (1950–53; 1962),[221] and North Vietnam (c. 1965–73).[222]

E. OTHER IMPARTIAL HUMANITARIAN ORGANIZATIONS

Article 9 of the 1949 Convention provides that humanitarian activities for the benefit of prisoners of war may be performed not only by the ICRC, but also by "any other impartial humanitarian organization."[223] The Convention does not identify any organization, other

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[217] During a visit to the ICRC in Geneva the author was shown through the archives of the World War II Central Agency. The name of a close personal friend who had been a prisoner of war during World War II was mentioned—and in a matter of minutes his card was produced with entries showing the several prisoner-of-war camps in which he had been interned, with the dates of arrival at, and departure from, each one.

[218] For a review of the activities of the Central Prisoners of War Agency during world War II, *see* 2 ICRC *Report, passim.*

[219] 1 ICRC *Report* 408–36. Having denied the ICRC the right to function on its territory during World War II, during the Korean hostilities (1950–53) the Soviet Union supported the charge of the Chinese Communists that the ICRC was a "capitalist spy organization." U.K., *Treatment* 33–34. Under the circumstances, it is unexpected, indeed, to find the Soviet Union communicating to the Secretary-General of the United Nations its belief in the need for the ICRC to undertake additional tasks relating to the protection of human rights in armed conflict. U.N., *Human Rights*, A/8052, at 119–20.

[220] The frustration of the ICRC in its attempts to be permitted to function in North Korea is well-documented in the two volumes of ICRC, *Conflit de Corée, passim.*

[221] Draper, People's Republic, 353–67.

[222] ICRC *Annual Report*, 1970, at 40–41; *ibid.*, 1972, at 40–41. The confidence in the ICRC which is typical of most States is demonstrated by the provisions of Article 81(1), (2), and (3) of the 1977 Protocol I.

[223] The first paragraph of Article 10 refers to "an organization which offers all guarantees of impartiality and efficacy"; and the third paragraph of that Article

than the ICRC, which falls within the quoted term, nor does it amplify that term. However, it is possible to draw certain conclusions with respect to the nature of the organizations meant to be included within the term from analogous and collateral material.

Article 88 of the 1929 Convention, which was the direct progenitor of Article 9 of the 1949 Convention, did not include the possibility of the intervention of any "humanitarian organization" other than the ICRC for the purpose of furnishing assistance to prisoners of war. That possibility received recognition for the first time at the 1949 Diplomatic Conference when a proposal was made by the Italian representative to add the words "or any other impartial humanitarian body" following the reference to the ICRC in the original draft of what became Article 9.[224] It was adopted by the Joint Committee of the Diplomatic Conference after a debate in which the representative of the United States had supported the use for humanitarian purposes of "welfare organizations of a non-international character" and the Committee had rejected a Burmese proposal to narrow the Italian proposal to "any other *internationally recognized* impartial humanitarian body."[225] It was approved at a Plenary Meeting of the Diplomatic Conference without debate.[226]

The foregoing is the substance of the legislative history concerning the addition of the words "or any other impartial humanitarian organization" to Article 9 of the 1949 Convention.[227] There are clearly three basic requirements before an organization can claim to come within the meaning of the Article: first, it must be *impartial* in its operations; second, it must be *humanitarian* in concept and function; and third, it must have some institutional, operational, and functional *resemblance to the ICRC*. Negatively, it need not be international in creation and it need not be neutral in origin.[228]

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refers to "a humanitarian organization such as the ICRC." From the context it would appear that the draftsmen intended that an organization would have the same qualifications in any of the three situations, even though different words were used and different goals were sought. Article 81 (4) of the 1977 Protocol I refers to "the other humanitarian organizations referred to in the Conventions and this Protocol." Article 5 (4) of the Protocol adopts the language of the first paragraph of Article 10 of the 1949 Convention quoted above.

[224] 2B *Final Record* 21.

[225] *Ibid.*, 60 (emphasis added).

[226] *Ibid.*, 346.

[227] At some point in the deliberations the word "body" was changed to "organization," but this author was unable to pinpoint the event—a result not unique to this particular matter.

[228] For a discussion in depth of this problem, see Levie, Repatriation 697–701. The organization referred to in note 58 *supra* would probably qualify. This author has strong reservations concerning both the "impartiality" and the "efficacy" of any alleged humanitarian organization with political parentage, such as one that is a creature of the United Nations. *See* pp. 18–19 *supra*.

Assuming, as we have, that the humanitarian organizations mentioned in Articles 9 and 10 of the Convention were intended to have identical qualifications, and that the ICRC serves as the prototype for "an impartial humanitarian organization," much that has been said with respect to the ICRC would, in an appropriate case, be applicable to any organization authorized by one or more of the belligerents to function under either of those articles.[229] Notable exceptions to the foregoing statement are to be found in the first paragraph of Article 123 which refers only to the ICRC in authorizing the proposal of the creation of a Central Prisoners of War Information Agency; the fourth paragraph of Article 123 which refers to the humanitarian activities of the ICRC "or of the relief societies provided for in Article 125"; and the last paragraph of Article 126 which very pointedly assigns only to the ICRC and its delegates the prerogatives enjoyed by the Protecting Power of visiting prisoner-of-war installations and interviewing prisoners of war privately, with no mention whatsoever of any other organization of any kind.[230] All in all, it may be said that while other humanitarian organizations recognized by one or more of the belligerents are accorded many of the privileges which the Convention accords to the ICRC, the latter still occupies a very special position insofar as assistance to prisoners of war is concerned.[231]

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[229] While various terms are used to designate the other humanitarian organizations (*see*, for example, the third paragraphs of Articles 72 and 73, the first paragraph and subparagraph (b) of Article 75, and the first paragraph of Article 79), the import of many of the provisions of the Convention, with the exceptions noted in the text, is that what the ICRC may do, another humanitarian organization may do, if it has been approved by one or more of the belligerents.

[230] Conversely, the ICRC is not specifically mentioned in the first paragraph of Article 125, which requires the Detaining Power to provide the representatives of "religious organizations, relief societies, or any other organization assisting prisoners of war . . . with the necessary facilities for visiting the prisoners [of war]." However, this right of visitation is not for the purpose of inspection or interview, but solely for the purpose of the distribution of relief supplies and other materials intended to improve morale; and even here, the third paragraph of Article 125 recognizes the special position of the ICRC in this field. (Of course, an organization designated as a substitute for a Protecting Power under the provisions of the three paragraphs of Article 19 would enjoy the prerogatives of visitation and interview under the provisions of the first two paragraphs of Article 126.)

[231] *See* Article 5 (3) and (4) of the 1977 Protocol I.

CHAPTER V

THE PUNISHMENT OF PRISONERS OF WAR

A. INTRODUCTORY

The probability that many prisoners of war will commit, or will be alleged to have committed, violations of the laws, rules, and regulations of the Detaining Power specifically governing their conduct, as well as its general criminal laws, has been demonstrated to be fairly high, as has the tendency of Detaining Powers to desire to punish them summarily.[1] Detailed international regulation of the punishment of prisoners of war for alleged misbehavior of any kind is therefore of major importance in the overall system of protections afforded to prisoners of war under international law.

In the drafting of convention provisions concerning prisoners of war there has been a steadily increasing conflict between the desire to provide the prisoners of war with the maximum possible protection against arbitrary and inhumane action on the part of the Detaining Power and its representatives and the need to permit the Detaining Power to retain the tools necessary to enable it to maintain order among the prisoners of war, to afford them protection from outsiders and from the unruly amongst them, and to ensure that they will constitute a minimum security problem.[2] As the humanitarian desire to protect prisoners of war has found greater and greater expression in succeeding agreements, the maintenance of discipline among and control over them has become more and more difficult for the Detaining Power intent on full compliance with the provisions of the Convention. While the 1907 Hague Regulations dealt with the subject of the punishment of prisoners of war in the single, very general, Article 8, the 1929 Convention included 23 articles (Articles 45–67) on the subject; and the 1949 Convention includes 27 such articles (Articles 82–108);[3] and it must be borne in mind that in very large part the new articles are procedural in nature, successively imposing additional restrictions on the imposition of punishment on prisoners of war by the Detaining Power.

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[1] *See, e.g., I.M.T.F.E.* 1028.

[2] Hermes, *Truce Tent* 234–35.

[3] Among the 23 articles of the 1929 Convention there were three on the subject of escape; and among the 27 articles of the 1949 Convention there are four on that subject (Articles 91–94). These articles on escape are discussed in detail in Chapter VII (at pp. 403–407 *infra*), rather than in this chapter.

The use of force by the Detaining Power to maintain control over prisoners of war is, of course, still a reality and it is still legal under appropriate circumstances. While Article 42 of the Convention restricts the use of weapons by the Detaining Power against prisoners of war by designating such action as "an extreme measure, which shall always be preceded by warnings appropriate to the circumstances," it is certainly implicit in the provisions of that Article that force, including the use of firearms, may be used by the representatives of the Detaining Power when the circumstances leave no alternative if control is to be maintained by the latter.[4] Attempts to escape are specifically recognized in that Article as one set of circumstances where the use of weapons by guards may become necessary. Such attempts by individuals, or even by small groups of prisoners of war, do not present a great threat to the security of the Detaining Power but, nevertheless, the guards may use weapons against the escaping prisoners of war if this use is necessary in order to frustrate their efforts.[5] Attempted mass escapes do present such a threat and no Detaining Power can permit, or can be expected to permit, such an effort to succeed, no matter how much force may be necessary in order to prevent it.[6] Similarly, mutinies by rebellious prisoners of war obviously cannot be tolerated by any Detaining Power. When such an event occurs, the Detaining Power's guards will uniformly be ordered to use truncheons, tear gas,[7] concussion grenades, and other available anti-riot instruments, and, if these prove inadequate, shotguns, rifles, machine guns, and any other appropriate types of weapons.[8] Moreover, while at-

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[4] A postaction determination as to whether the use of weapons was actually necessary is provided for through the medium of an inquiry conducted pursuant to Article 121. *See* notes I-379 *supra* and VII-47 *infra*.

[5] Harvey, Control 135. Even the sometimes ultrahumanitarian ICRC recognizes and accepts this as the rule. Pictet, *Commentary* 247.

[6] The action taken by the Australians to frustrate an attempted mass escape of Japanese prisoners of war at Cowra in August 1944 was completely legal even though more than 100 prisoners of war were killed in the ensuing melée. Concerning this episode, see Long, *The Final Campaigns* 623–24. The action taken on Hitler's orders after the mass escape of British prisoners of war from Stalag Luft III in March 1944, in which 50 recaptured officers were summarily executed by the Gestapo, was completely illegal, as it was not done as a necessary act to frustrate the escapes but as illegal punishment for having attempted to escape. Concerning this episode, see *The Stalag Luft III Case*.

[7] The Korean experience mentioned in note 8 *infra* was undoubtedly one of the factors that motivated the United States, in its renunciation of the first use of riot-control agents, to except cases involving "rioting prisoners of war" and "escaping prisoners." Executive Order 11850, 8April 1975, Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents, 3A *C.F.R.*. 149 (1975 comp. 1976).

[8] It was necessary to use many of these weapons, resulting in the deaths of a number of prisoners of war (and of some guards) when, on order from their military authorities in North Korea, and in execution of previously conceived and

tempted escapes are the subject of special restrictions insofar as the punishment of prisoners of war is concerned,[9] no such protections are afforded to prisoners of war who engage in rioting or mutiny and they are subject to the judicial prosecution and punishments hereinafter discussed.[10]

In drafting the articles of the Convention relating to the punishment of prisoners of war, the 1949 Diplomatic Conference deemed it appropriate to divide them into three major categories: (1) general provisions (Articles 82–88); (2) disciplinary sanctions (Articles 89–98);[11] and (3) judicial proceedings (Articles 99–108).[12] While this division into three categories is appropriate and helpful, and will be generally followed herein, it is believed that the allocation of subject matter to these categories in the Convention is not entirely what it should be. Accordingly, the discussion that follows will vary considerably from the numerical order contained in the Convention.

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well-organized plans (Ball, POW Negotiations 64), at various times during 1951 and 1952 the prisoners of war held in prisoner-of-war camps in South Korea mutinied, murdered nonparticipating prisoners of war, refused to obey orders of the representatives of the Detaining Power, and temporarily took over control of some of the overcrowded camps. These events culminated in the mutiny in May 1952 of thousands of prisoners of war confined at the prisoner-of-war camp located on Koje-do Island. Concerning these episodes, see Hermes, *Truce Tent* 232–63; Vetter, *Mutiny, passim;* Harvey, Control, *passim.* For the present U.S. policy on riot control in prisoner-of-war camps, see U.S. Army *FM* 19-40, *Enemy Prisoners of War, Civilian Internees and Detained Persons,* paras. 3-71 to 3-78 (1967). For a discussion of the *Code of Conduct* and what the United States apparently expects of members of its armed forces who become prisoners of war, see Walzer, Prisoners of War, *passim.*

[9] *See* pp. 403–407 *infra.*

[10] Under Article 94(b), *Uniform Code,* the maximum punishment for mutiny is death. With respect to the special nature of prisoner-of-war mutinies, see 1947 GE Report 204–05. One author stated (in 1951) that severe penalties for prisoners of war are not justified and that "the question is simply and uniquely to subject them to a certain degree of supervision and to prevent them from committing any acts of aggression." Paquin, Le problème des sanctions disciplinarires 52–53 (transl. mine). He obviously did not foresee the dogma that the Communists would adopt with respect to their personnel who became prisoners of war in Korea and Vietnam.

[11] By "disciplinary sanctions," "disciplinary measures," and "disciplinary punishment" (the words are used more or less interchangeably in the Convention), the draftsmen of the Convention meant punishment for minor offenses that could be imposed by the camp commander, or his appointee for the purpose, without the necessity of formal trial. The terms may be equated to the "commander's punishment" or "captain's punishment" (aboard ship) pursuant to which most military forces permit their commanders to impose a similar type of punishment on members of their commands. *See, e.g.,* the power to impose "nonjudicial punishment" granted by Article 15, *Uniform Code.*

[12] This trichotomy originated in a recommendation of the 1947 Conference of Government Experts. 1947 GE Report 201.

B. PROVISIONS OF GENERAL APPLICABILITY

1. Laws, Regulations, and Orders Applicable

Article 8 of the 1907 Hague Regulations made prisoners of war "subject to the laws, regulations, and orders in force in the army of the State in whose power they are" and authorized that State to take appropriate measures in the event of "any act of insubordination."[13] These provisions were carried over with only minor changes into Article 45 of the 1929 Convention.[14] With considerable editorial, but little substantive, change, they became the basis for the first paragraph of Article 82 of the 1949 Convention.[15]

As we have seen, the actual Detaining Power, whether or not it was the Capturing Power, is primarily responsible for ensuring that prisoners of war receive the treatment specified in the Convention.[16] Correlative with that responsibility is the principle of the first paragraph of Article 82 making the prisoners of war subject to the laws, regulations, and orders of the actual Detaining Power rather than to those of the Capturing Power. Thus, if a prisoner of war is captured by the armed forces of State *A*, but he is thereafter transferred to the custody of an ally, State *B*, he immediately becomes subject to the laws, regulations, and orders of State *B*.[17] If he should subsequently be transferred to the custody of still another ally, State *C*, he would immediately cease to be subject to the laws, regulations, and orders of

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[13] Writing in 1942, Flory stated that in Anglo-American law "prisoners of war have received for several hundred years national treatment when accused of crimes cognizable by civil courts." Flory, *Prisoners of War* 93.

[14] The 1947 Conference of Government Experts referred to "the fundamental principle of Art. 45, which assimilates PW to nationals of the DP." 1947 GE Report 203.

[15] For example, "the State in whose Power they are" became "the Detaining Power"; and the last part of Article 45, sometimes translated into English as "[t]he provisions of the present chapter, however, are reserved" [*e.g.*, 1 Friedman 505] (a rather meaningless phrase that was often made to end with the word "controlling") became "[h]owever, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed" in Article 82 of the 1949 Convention.

[16] *See* pp. 104–106 *supra*.

[17] For a World War II application of this rule, see 3 *Bull. JAG* 465 (1944) where prisoners of war captured by the British and Canadians had been transferred to United States custody. During the hostilities in Vietnam, all prisoners of war captured by the armed forces of the United States were transferred to the custody of the armed forces of the Republic of Vietnam. They were then subject to the laws, regulations, and orders of that Republic, and not of the United States. (Because of the contingent responsibility of the United States as the Capturing Power, it maintained small detachments at each prisoner-of-war camp to observe the treatment received by the prisoners of war and to ensure compliance with the Convention. Levie, Maltreatment in Vietnam 339–40. However, this did not affect the applicability of South Vietnamese laws, etc.)

State *B* and become subject to those of State *C*, the new Detaining Power.[18]

One major problem may arise with respect to these provisions: what laws, regulations, and orders are applicable when the Detaining Power is not a State, but an international organization or group? Who was the actual Detaining Power in Korea, where the prisoners of war were stated to be in the custody of the United Nations Command? If there were, for example, an armed conflict involving the States composing NATO, or those composing the Warsaw Pact, could either of those groupings claim to be the Detaining Power, rather than its individual members?

In the unlikely event that the United Nations should itself ever directly recruit, train, maintain, and field an armed force, it would necessarily be the Detaining Power of any prisoners of war captured by such force. The United Nations is not a Party to the 1949 Convention and, most probably, is not eligible to become a Party.[19] While it has, on occasion, agreed that its composite armed forces would comply with the principles of the Convention,[20] this would leave unanswered the question of the laws, regulations, and orders to be applied by those armed forces for the maintenance of order and the punishment of prisoner-of-war offenses.[21] It appears to be a situation that the various draftsmen of the Convention either did not envision or, if they did, believed to be so remote a possibility that no provision covering it was deemed necessary.

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[18] The foregoing statements should not be construed as being applicable to an offense committed by the prisoner of war prior to his transfer to the custody of the new Detaining Power.

[19] Although nowhere does the Convention provide that only States may be Parties, that appears to be implicit in many of its provisions. For example, the second paragraph of Article 2 and the first paragraph of Article 3 refer to the "territory" of a High Contracting Party; the term "Power" is used throughout the Convention in referring to the High Contracting Parties (Article 139 opens it to accession by any "Power"); and the first paragraph of Article 127 refers to the "respective countries" of the High Contracting Parties, etc. Simmonds, *Legal Problems* 182 is in agreement with the foregoing conclusion. Seyersted, *United Nations Forces* 352–53, argues that the United Nations could accede to the Convention even though it is not a State.

[20] Simmonds, *Legal Problems* 175–76; Seyersted, *United Nations Forces* 190–92. The Acting Secretary General of the United Nations has, on at least one occasion, formally advised the President of the ICRC to that effect. 2 *I.R.R.C.* 29 (1962), *quoted in* Simmonds, *Legal Problems* 183. For a specific United Nations directive to this effect, see *e.g.*, Article 44, Regulations for the United Nations Emergency Force, ST/SGB/UNEF/1, 20 February 1957. (Article 40 of the UNFICYP Regulations is to the same effect.)

[21] This question was raised by the ICRC with respect to the United Nations Command in Korea in 1951. 1 ICRC, *Conflit de Corée*, No. 220.

In Korea the United Nations Command took the position that it was the Detaining Power.[22] Nevertheless, no statement was ever made on its behalf concerning the applicability of the Convention.[23] Having no substantive or procedural criminal codes to govern the conduct and punishment of prisoners of war, the United Nations Command had no alternative but to draft and promulgate numerous such codes.[24] The propriety of such action is debatable, at the very least. It would appear that inasmuch as the United Nations Command was composed of national units made available by Member States and the Republic of Korea, the State whose armed forces captured prisoners of war was the Capturing Power as to them and that, unless and until it transferred them to custody of the armed forces of another Party to the Convention participating in the United Nations Command, it was the Detaining Power, and its laws, regulations, and orders were applicable.[25] *A fortiori,* this same conclusion must be reached with respect to prisoners of war captured by members of the armed forces of an international grouping such as NATO, the Warsaw Pact, etc.[26]

The second paragraph of Article 82 places a specific limitation upon the Detaining Power with respect to any laws, regulations, or orders

[22] *Ibid.*, No. 237.

[23] The statements concerning willingness or intention to comply with the "humanitarian principles" of the 1949 Convention, even though it was not then in effect, were made by the governments of the States that had contributed armed forces to the United Nations Command. *See, e.g., ibid.*, Nos. 12, 15, 20, 22, 23, etc.

[24] *See* 2 ICRC, *Conflit de Corée*, No. 337. These included (1) Rules of Criminal Procedure for Military Commissions of the United Nations Command, 22 October 1950. (These Rules were to be applied only in trials for precapture offenses.); (2) Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command, 6 October 1951. (These Rules were to be applied only in trials for postcapture offenses.); (3) Regulations Governing the Penal Confinement of Prisoners of War, 20 October 1951; (4) Non-Judicial Punishment of Prisoners of War, 19 October 1951; and (5) Articles Governing United Nations [sic] Prisoners of War, 23 October 1951. Reference to the promulgation of these Codes will be found in 1951 *Y.B.U.N.* 248. No trials were ever conducted under any of these Rules and Regulations.

[25] While Baxter, Constitutional Forms 336, states, with respect to the activities of the United Nations Command, that "it is necessary to ask what juridical person is responsible for the custody of prisoners of war" in Korea, unfortunately, he does not attempt to answer that question.

[26] Miller, *The Law of War* 279–80 suggests that the member States of military alliances "should determine, in advance of coalition warfare, the law of the detaining power to be applied in the event of war." He gives no legal basis for such a procedure and it would be directly contrary to the provisions of the first paragraph of Article 82 if subsequent developments indicated that the law agreed upon and applied was other than that of the actual Detaining Power. The European Defense Community contemplated uniform community regulations on military penal law and jurisdiction that would have been applicable to all personnel of intergovernmental forces (and, therefore, to all prisoners of war taken by those forces). Williams, *Intergovernmental Military Forces and World Public Order* 586–87.

promulgated by it to govern the conduct of prisoners of war. If such a law, regulation, or order makes punishable acts that are not punishable when committed by a member of the armed forces of the Detaining Power, the maximum punishment imposable may be of a disciplinary nature only.[27] The requirement of the second paragraph of Article 41 that "[r]egulations, orders, notices and publications of every kind relating to the conduct of prisoners of war" must be made available to them in a language that they understand, etc., may also be considered to some extent as a limitation on the disciplinary powers of the Detaining Power,[28] inasmuch as, if the Detaining Power fails to comply with this provision, it may not punish a prisoner of war for a violation of the directive, as to which there is, in effect, an irrebutable presumption that he had no knowledge.

2. Miscellaneous Rules

a. DECISION AS TO THE NATURE OF THE PROCEEDINGS

When a prisoner of war is alleged to have violated one of the laws, regulations, or orders of the Detaining Power governing his conduct, the first decision that the latter must make is as to the type of punishment warranted by the particular offending act. A similar decision must usually be made by someone in the military hierarchy in most armed forces before specific charges against a member of that armed force are referred for action.[29] Moreover, Article 83 admonishes that the competent authorities of the Detaining Power should exercise leniency in making this decision and also that they should, if possible, decide in favor of disciplinary, rather than judicial, measures.[30]

b. DOUBLE JEOPARDY[31]

The Convention is clear and unambiguous on the question of double

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[27] For a discussion of the permissible disciplinary punishments listed in the first paragraph of Article 89, *see* pp. 326–330 *infra*.

[28] Concerning the second paragraph of Article 41, see p. 167 *supra*.

[29] *See, e.g.*, Article 30(b), *Uniform Code*. In some armed forces, such as that of the United States, the level of the court to which the case is sent for adjudication will, in and of itself, determine the maximum punishment that may be imposed. *See, e.g., ibid.*, Articles 18–20.

[30] The second paragraph of Article 87 carries this a step further by directing that, in the ultimate imposition of punishment, serious consideration should be given to "the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will." (The relevance of such consideration to the case of a prisoner of war charged with rape, the murder of a fellow prisoner of war, etc., is a little difficult to discern. For a discussion of this problem, see p. 337–338 *infra*.)

[31] Although Article 86 is captioned "*non bis in idem*" (usually translated "no one shall be twice *tried* for the same offense"), it is a second *punishment* that is actually prohibited by that Article, rather than a second *trial*. (The article headings were added by the Swiss Political Department and are not actually a part of the Convention. 1 *Final Record* 369, 375.) For this reason, the imposition of even

jeopardy.[32] Article 86 states flatly that "[n]o prisoner of war may be punished more than once for the same act, or on the same charge."[33]

3. Limitations on Punishment

There are a number of provisions that were included in the Convention in order to ensure that the punishment imposed upon prisoners of war would, in no manner, exceed that imposed upon members of the armed forces of the Detaining Power under similar circumstances; and that certain types of punishment would not be inflicted upon prisoners of war even if they were permissible in the case of members of the armed forces of the Detaining Power.[34] Thus, the first paragraph of Article 87 provides that the only punishments that may be adjudged against a prisoner of war shall be those that could be adjudged against a member of the armed forces of the Detaining Power who has committed the same act; and the first paragraph of Article 88 provides that the prisoner of war undergoing such punishment shall not be subjected to more severe treatment than would be imposed upon a member of the armed forces of the Detaining Power of comparable rank.[35] Obviously, these provisions establish a national standard both as to the extent of the punishment that may be adjudged against a prisoner of war and as to the conditions under which he may be compelled to undergo it. However, the Convention also contains provisions with respect to punishment that may, in the case of some Detaining Powers, establish a higher-than-national standard. Thus, the third paragraph of Article 87 prohibits all types of collective pun-

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disciplinary punishment would preclude a subsequent judicial proceeding and punishment. During World War II the Germans, on occasion, demonstrated a feeling of frustration because an act considered by higher authority to be serious (relations between a prisoner of war and a German woman) had already been dealt with by the local commander as a disciplinary matter, thus precluding judicial prosecution. *German Regulations* No. 20, para. 240. *But see* note 32 *infra*.

[32] Article 52, third paragraph, of the 1929 Convention was just as clear and unambiguous—but this did not prevent the Germans from trying prisoners of war twice for the same offense during World War II. *See, e.g.*, the incident that occurred in Oflag 64 in late 1944 and early 1945. American Prisoners of War 36.

[33] At the 1949 Diplomatic Conference the United Kingdom sought to add to this article a prohibition against the increasing on appeal of the punishment imposed below (3 *Final Record*, Annex 147), a practice permitted by a number of civil-law countries. It was unsuccessful. 2A *Final Record* 501.

[34] Provisions similar to those about to be discussed were previously to be found in Article 46 of the 1929 Convention.

[35] For a discussion of the provisions specifying a similar type of protection, as well as others, for women prisoners of war, *see* p. 179 *supra*. Concerning retained personnel, *see* pp. 73–74 *supra*.

ishment,[36] corporal punishment,[37] imprisonment in premises without daylight, and, generally, any form of torture or cruelty.[38] The last paragraph of Article 87 prohibits the Detaining Power from depriving a prisoner of war of his rank, and from preventing him from wearing his insignia of rank or nationality as an incident to any punishment imposed.[39] And the last paragraph of Article 88 provides that once a prisoner of war has completed his punishment he "may not be treated differently from other prisoners of war."[40]

One definite problem exists with respect to the interpretation to be given the last sentence of the second paragraph of Article 87. That sentence states that the "courts or authorities"[41] of the Detaining Power "shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused [found guilty?], and shall therefore not be bound to apply the minimum penalty prescribed." It would appear that this provision constitutes an attempt to modify by international treaty the domestic criminal law of Detaining Powers.[42] Thus, if such law provided that the penalty for a particular offense was "not less than three years confinement at hard labor," the court finding a prisoner of war guilty of that offense would, presumably, under this provision of the Convention, have the authority to

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[36] Although collective or mass punishments were likewise prohibited by the last paragraph of Article 46 of the 1929 Convention, they were, unfortunately, not infrequent during World War II. *See, e.g., I.M.T.F.E.* 1089–90; American Prisoners of War 16. In Korea the Chinese similarly disregarded this prohibition. U.K. *Treatment* 32. It seems likely that it will be disregarded by many Detaining Powers in any future international armed conflict. Miller, *The Law of War* 248, 260, 262, etc.

[37] Article 33, Standard Minimum Rules, specifically prohibits the use of handcuffs, chains, irons, and straitjackets as punishments. (*See also* U.S. Army *Regs.* 633-50, para. 99d.) Such a provision might well have been included in the third paragraph of Article 87 instead of relying on the general term "corporal punishment" as a catchall.

[38] The use of torture would, of course, constitute a grave breach of the Convention even without this provision. *See* pp. 357–358 *infra.* The cited provisions of Article 87 are the obvious source of Article 31, Standard Minimum Rules.

[39] *See* p. 170 *supra.*

[40] Article 92, third paragraph, specifies that despite this provision unsuccessful escapees may, except for certain enumerated restrictions, be subjected to "special surveillance."

[41] "Courts" refers to the courts of the Detaining Power, either civilian or military, having jurisdiction over prisoner-of-war offenses under the Detaining Power's domestic law (see Article 84, first paragraph); and "authorities" refers to the military authorities having the power to impose disciplinary punishment (*see* Article 96, second paragraph).

[42] This was seemingly understood by the 1949 Diplomatic Conference inasmuch as the British representative "pointed out that certain difficulties might arise in United Kingdom courts, which would be unable to apply penalties less severe than the minimum penalty prescribed for a given offense." 2A *Final Record* 304–05 & 310.

sentence him to only one year of confinement, perhaps not at hard labor. While this could cause internal legal problems in a number of countries, the likelihood of its actual occurrence seems rather remote.[43]

C. PROVISIONS APPLICABLE TO DISCIPLINARY SANCTIONS

As we have already seen, the Convention is here concerned with minor offenses such as breaches of discipline, rather than major offences such as crimes.[44] Always bearing in mind the provisions of general applicability, which are, of course, applicable to disciplinary sanctions as well as to judicial prosecutions, let us now review the provisions of the Convention peculiar to disciplinary matters.

1. Who May Impose Disciplinary Sanctions

As in the case of most armed forces, disciplinary measures will normally be imposed by the military commander—in this case, the prisoner-of-war camp commander. The second paragraph of Article 96 gives him this power, at the same time indicating that this grant is without prejudice to the competence of superior military authorities who may, of course, supplant the camp commander in this area of prisoner-of-war management. The prisoner-of-war camp commander may delegate his disciplinary powers to one of his officers.[45] The third paragraph of Article 96 prohibits the delegation of disciplinary powers over prisoners of war to another prisoner of war.[46] It would appear that this limitation not only prohibits such a delegation of authority by any representative of the Detaining Power, but also prohibits the assumption of disciplinary powers by the senior prisoner of war in the camp or by the prisoners' representative under the law of the Power of Origin.[47] Nor may there be a delegation of disciplinary powers to, or assumption of such powers by, civilian contractors to whom prisoners of war have been furnished as a labor force.[48]

2. Procedure

The important Article 96 opens with the admonition that "[a]cts which constitute offences against discipline shall be investigated immediately." Certainly, that admonition does not mean that the military

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[43] *See* Paquin, Le problème des sanctions disciplinaires 54.

[44] *See* note 11 *supra.*

[45] During World War II *German Regulations* No. 10, para. 3 authorized only camp commanders and work-detail leaders of officer rank to exercise disciplinary powers over prisoners of war.

[46] Apparently, the United States did permit this practice during World War II, at least with respect to the Italian Service Units. Lewis & Mewha 186.

[47] JAGW 1965/1325, 22 September 1965. *See also British Manual, para.* 159 n.2, stating that courts-martial of the Power of Origin may not convene in a prisoner-of-war camp. *See also* p. 336 *infra,* concerning prisoner-of-war "kangaroo" courts.

[48] Anon., Employment in Germany 323. *See German Regulations* No. 27, para. 386.

authorities of the Detaining Power may not completely disregard a breach of discipline by a prisoner of war if they choose to do so. In other words, it does not purport to require that every breach of discipline be investigated and punished. What it undoubtedly seeks to ensure is that disciplinary proceedings with respect to minor offenses will not be delayed, perhaps until the prisoner of war concerned is no longer able to produce supporting testimony, or, perhaps, has himself forgotten the exact details of the incident out of which arose the proposal to punish.

The fourth paragraph of Article 96 establishes the method by which a determination is made as to whether disciplinary punishment is warranted and should be imposed. The accused prisoner of war must be advised of the charge being made against him; he must be given an opportunity to defend himself, including an opportunity to explain his conduct and to call witnesses in his behalf; and, if necessary, he must be provided with a qualified interpreter. Both the accused prisoner of war and the prisoners' representative must be advised of the decision. Moreover, the last paragraph of Article 96 contains a new provision under which the camp commander is required to maintain a record of all disciplinary punishments imposed, and this record must be open to inspection by the representatives of the Protecting Power. This is a modest attempt to prevent the military authorities of the Detaining Power from imposing punishment secretly and without any justification.[49]

3. Prehearing Confinement

One entire article, plus a portion of another, is devoted to the subject of prehearing confinement.[50] The first paragraph of Article 95 establishes the applicability of the national standard: a prisoner of war may not be subjected to prehearing confinement unless a member of the armed forces of the Detaining Power would be so subjected if charged with a similar offense. This paragraph concludes with an exception to the national standard: "[unless] it is essential in the interests of camp order and discipline." It would seem that this exception opens the door to improprieties on the part of the military authorities of the Detaining Power. Any conduct truly making confinement "essential in the interests of camp order and discipline" would

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[49] One author has written that this provision "constitutes one of the most remarkable advances realized in the new Convention." Paquin, Le problème des sanctions disciplinarires 58 (transl. mine). While it will unquestionably be of value, that statement would appear to exaggerate its importance considerably.

[50] The logic of this emphasis on the subject becomes obvious when it is considered that while the maximum duration of confinement that may be imposed in a disciplinary proceeding is 30 days (*see* pp. 327–328 *infra*), without this protection there would assuredly be many instances in which the prisoner of war was kept in pre-hearing confinement for a period in excess of that maximum.

certainly be of such magnitude that similar conduct on the part of a member of the armed forces of the Detaining Power would result in the offender's being subjected to prehearing confinement (or, more probably, being charged with an offense calling for judicial prosecution, rather than disciplinary punishment). Accordingly, there was no need for the exception, and it merely constitutes an excuse for violations of the preconfinement provision of the Convention.[51]

The second paragraph of Article 95 mandates the reduction of prehearing confinement of prisoners of war to a minimum and sets an outer limit of 14 days for such confinement. The first paragraph of Article 90 directs that the period spent in prehearing confinement be deducted from the punishment ultimately imposed in the disciplinary proceedings. Including the 14-day limit was an improvement over the relevant provision of the 1929 Convention, as was the requirement that the time spent in prehearing confinement be deducted from the punishment imposed.[52]

Finally, the third paragraph of Article 95 prescribes the conditions under which such prehearing confinement is to be served. Inasmuch as the same rules apply to both prehearing confinement and confinement served pursuant to the decision reached after the disciplinary hearing, the subject will be discussed immediately below in connection with authorized disciplinary punishments.

4. Authorized Disciplinary Punishments

The first paragraph of Article 89 specifies the four types of punishment that may be imposed upon prisoners of war in disciplinary proceedings. These four types of punishment are exclusive; no other types of punishment may be imposed as a result of disciplinary proceedings, even if the laws of the Detaining Power permit the imposition of additional types (or more severe punishment for these types) upon members of its armed forces (*see* below).

a. FINES

It may seem strange that the Convention should provide for a monetary sanction against prisoners of war, but reflection will indicate the logic of such a sanction. As we have seen, there are a number of provisions ensuring prisoners of war an income,[53] albeit a very small one,

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[51] During the discussion at the 1949 Diplomatic Conference the French representative stated that he "saw no objection to modifying the last part of the first paragraph [of Article 85, later renumbered Article 95] because of the wide interpretation it made possible." 2A *Final Record* 493. Presumably, he was referring to the clause complained of in the text. No further reference to the matter could be located in the Conference discussions.

[52] The third paragraph of Article 47 of the 1929 Convention provided for such a deduction—but only if it was granted to members of the armed forces of the Detaining Power. The deduction is no longer dependent upon that contingency.

[53] *See* pp. 194–206 *supra*.

primarily in order to enable them to make purchases at the camp canteen.[54] Accordingly, cutting off that income, or any part of it, is a meaningful sanction. However, paragraph (1) of Article 89, in authorizing a fine as disciplinary punishment, limits the amount thereof to 50 percent of the combined advances in pay and working pay that would accrue to the prisoner of war during a 30-day period.[55]

b. DISCONTINUANCE OF PRIVILEGES IN EXCESS OF THOSE SPECIFIED IN THE CONVENTION.

While it is not a situation that prevails widely, there are occasions when a Detaining Power grants to prisoners of war privileges not required by the Convention.[56] However rare this may be, it was appropriate to include the authority to withdraw such a privilege as one of the potential disciplinary punishments. Absent such a right to withdraw a gratuitous privilege from a particular prisoner of war for misconduct, few Detaining Powers would ever find it possible to grant such privileges.[57]

c. FATIGUE DUTIES

This punishment consists of extra-duty chores (beyond regular work hours and beyond normal duty-roster assignments), such as policing of the prisoner-of-war camp grounds, kitchen police, etc.[58] The imposition of such extra fatigue duty as disciplinary punishment is limited to 2 hours per day; and Article 90 limits the overall duration to 30 days.

d. CONFINEMENT

The draftsmen of the Convention considered that no explanation was necessary concerning this type of disciplinary punishment. However, they did consider it necessary to include a mass of provisions placing limitations on the nature and conditions of the confinement, either indirectly (Articles 90, 87, and 89), or directly (Articles 97 and 98). Thus the first paragraph of Article 90 restricts the duration

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[54] Concerning camp canteens, *see* pp. 143–145 *supra*.

[55] The ICRC has computed this maximum fine to be 7.25 Swiss francs. Pictet *Commentary* 437. For sample conversions to other monetary systems, see note II-431.

[56] For an example of a grant to prisoners of war beyond the requirement of the 1929 Convention during World War II, *see* note II-427 *supra*.

[57] Some will argue that any privilege granted by a Detaining Power beyond the requirements of the Convention may be withdrawn by the Detaining Power at any time and without any need to justify its action. While there is considerable merit to this argument when the Detaining Power is withdrawing the privilege completely (even though it may, under some circumstances, resemble collective punishment), its status as punishment becomes obvious when the privilege is withdrawn from only one prisoner of war while the others retain it.

[58] The second paragraph of Article 89 makes this type of disciplinary punishment inapplicable to officers.

of any single punishment to 30 days; and this restriction would, of course, apply to confinement imposed as disciplinary punishment. The third paragraph of Article 87 prohibits "imprisonment" in premises without daylight; and this, too, would apply to confinement imposed as disciplinary punishment. The last paragraph of Article 89 bans generally any disciplinary punishment that is inhuman, brutal, or dangerous to the health of the prisoners of war; and this, too, would apply to confinement imposed as disciplinary punishment.[59] And Articles 97 and 98 contain detailed and specific rules concerning the conditions under which confinement imposed upon prisoners of war as disciplinary punishment is to be served. Thus, prisoners of war undergoing disciplinary punishment may not be confined in a penitentiary type of establishment (Article 97, first paragraph); the establishment in which they are confined must meet the sanitary requirements of Article 25[60] and the confined prisoners of war must be able to maintain their personal cleanliness as required by Article 29[61] (Article 97, second paragraph); they must be permitted to attend the daily medical inspection,[62] to receive any appropriate medical treatment and, if necessary, to be removed to a medical facility (Article 98, fourth paragraph); they must be allowed at least two hours of exercise daily in the open air (Article 98, third paragraph); they must continue to be accorded the benefits of the Convention including the rights granted by Article 78 to make complaints with respect to the conditions of their confinement[63] and by Article 126 to confer privately with the representatives of the Protecting Power[64] (Article 98, first paragraph); they must be granted the right to read and write and to send and receive correspondence[65] (Article 98, last paragraph); officer prisoners of war may not be confined in the same quarters as noncommissioned officers or enlisted men (Article 97, third paragraph); and no prisoner of war may be deprived of the prerogatives attached to his rank (Article 98, second paragraph).

There are still other rules governing the performance of disciplinary punishment. As has been noted immediately above, no such punishment may exceed a duration of 30 days. The second paragraph of

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[59] Actually, the cited portions of the third paragraphs of Articles 87 and 89 apply only to confinement and, possibly, but rarely, to fatigue duties.

[60] *See* pp. 124–125 *supra.*

[61] *See* pp. 132–133 *supra.*

[62] *See* pp. 133–134 *supra.*

[63] *See* pp. 285–301 *supra.*

[64] *See* pp. 281 and 283 *supra.*

[65] The last paragraph of Article 98 authorizes the temporary detention, until the termination of the confinement, of parcels and of remittances of money. Concerning the implementation of this provision, and of the further provision of that last paragraph of Article 98 with respect to the disposition of perishable items in parcels, see p. 306 *supra.*

Article 90 specifies that this rule is applicable even if the disciplinary proceedings are concerned with several different acts of misconduct, related or unrelated, of the prisoner of war. The third paragraph of Article 90 requires that the disciplinary punishment be put into effect within one month of being imposed.[66] And the last paragraph of Article 90 provides that when a second disciplinary punishment is imposed upon a prisoner of war (as, for example, for some act committed while he is serving the punishment imposed earlier), and either of the two punishments exceeds 10 days in duration, a period of at least 3 days must elapse between the conclusion of the first punishment and the commencement of the second.[67] And the first paragraph of Article 115 prohibits the Detaining Power from denying repatriation or accommodation in a neutral country to a prisoner of war merely because he has not completed serving the disciplinary punishment that has been imposed upon him.[68]

One legal problem that arises in the area of disciplinary punishment is the limitation to be applied when the national law of the Detaining Power differs from that of the Convention provisions discussed above. While the first paragraph of Article 82 makes prisoners of war subject to the laws, regulations, and orders in force in the armed forces of the Detaining Power, it also contains the limitation that "no proceedings or punishments contrary to the provisions of this Chapter shall be allowed." Accordingly, if the law of the Detaining Power permits a more severe disciplinary punishment than does the Convention (as, for example, if such law permits the military commander to impose a disciplinary punishment of confinement for 60 days), the answer is simple: the limitation contained in the Convention is applicable. But what if the disciplinary punishment authorized by the law of the Detaining Power is less than the Convention permits?[69] A proper construction of the first part of the first paragraphs of Article 82 and of Article 87 would appear to limit the imposable punishment

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[66] The need for this provision is rather difficult to discern, as no possible advantage to the Detaining Power can be discovered in a delay in the execution of the punishment, whatever its nature may be.

[67] This rule is apparently applicable even if the two disciplinary punishments imposed are of a different nature, as, for example, where the first is confinement for 20 days and the second is a fine of 50 percent of the advances of pay for 30 days.

[68] *See* p. 413 *infra*.

[69] After World War I an English scholar called attention to the problem that the British had encountered in this regard, as their law did not permit officers to be subjected to disciplinary punishment and restricted such punishment for other ranks to 28 days' detention. Belfield, Treatment 141. For a similar problem that will confront the United States in this area, *see* note 70 *infra*.

to the maximum allowed under the national law of the Detaining Power.[70]

The foregoing discussion has undoubtedly demonstrated the lengthy and detailed provisions that the 1949 Diplomatic Conference felt itself constrained to include in the Convention in order to place upon the Detaining Power restrictions upon the imposition of disciplinary punishment that would be so clear that their evasion would be extremely difficult, and so comprehensive that there would be neither need nor opportunity for the Detaining Power to improvise.

D. PROVISIONS APPLICABLE TO JUDICIAL PROCEEDINGS

1. Laws, Regulations, and Orders Applicable

It will be recalled that Article 82 makes prisoners of war amenable to the laws, regulations, and orders of the Detaining Power. In addition, the first paragraph of Article 99 prohibits the punishment of a prisoner of war for the commission of an act that was not an offense against the law of the Detaining Power or against international law at the time it was allegedly committed—in effect, a ban on *ex post facto* criminal laws. (This might well have been made applicable to disciplinary punishments also.) The second paragraph of Article 99 prohibits the use of "moral or physical coercion" as a means of inducing a prisoner of war to confess his guilt of the offense with which he is charged.[71] (This, too, might well have been made applicable to disciplinary punishments.)

Experience during World War II and in Korea would seem to indicate that rather general violations of this latter provision can be expected to occur as a governmental policy based upon the legal and political systems of a particular country. Thus, because the Soviet legal system had always relied heavily on confessions, during World War II the Soviet practice with respect to German prisoners of war was to use the whole gamut of moral and physical coercion (from a bribe

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[70] Thus, while the Convention permits the disciplinary punishment of confinement for officer prisoners of war [Article 88, paragraph one], with the limitation that they may not be confined with noncommissioned officers and enlisted men [Article 97, third paragraph], Article 15, *Uniform Code*, does not permit their confinement— only their arrest in quarters or restriction to specified limits. Officer prisoners of war should be given the benefit of such a national limitation on disciplinary punishment. *U.S. Manual*, para. 172b, appears to be to the contrary, stating that an officer imposing disciplinary punishment on prisoners of war "is not subject to the limitations on the duration of commanding officers' nonjudicial punishment established by Article 15 of the Uniform Code of Military Justice." However, U.S. Army *Regs.* 633–50, para. 98, which is a later and more authoritative directive, contains no such statement.

[71] During World War II the conviction of two prisoners of war by a United States court-martial was set aside because during the investigation the interpreter had, pursuant to instructions of the investigating officer, told them that if they confessed "things would be much easier on them." 4 *Bull. JAG* 421 (1945).

consisting of the promise of a light sentence to extreme physical torture) in order to obtain confessions from prisoners of war accused of war crimes;[72] and, while the post-Stalin era has brought some changes in this area of the Soviet legal system, it remains to be seen whether a change in basic philosophy has actually occurred.[73] Similarly, in Korea, despite their protestations concerning the "lenient policy" applied in the treatment of prisoners of war, the Chinese Communists regularly used torture to obtain confessions, even to the commission of offenses that they well knew the prisoner of war had not committed.[74] Nothing in the post-Korea record of the People's Republic of China indicates any change, except for the worse, in this basic philosophy.[75] And there are undoubtedly other, less important, countries from which the same disregard of provisions prohibiting coercion to obtain confessions can be expected.[76]

2. Pretrial Procedures

Article 103 directs that the judicial investigation of an alleged prisoner-of-war offense be conducted as rapidly as circumstances permit so that the trial, if any, may take place as soon as possible. Once again, the Convention is not encouraging the Detaining Power to prosecute prisoners of war;[77] it is merely emphasizing the requirement for a speedy trial when it is determined that the offense allegedly committed by the prisoner of war warrants judicial prosecution, that requirement being based on the same general reasons that apply in the case of other trials.

The provisions of the Convention concerning pretrial confinement are, *mutatis mutandis*, similar to those dealing with the subject of prehearing confinement in disciplinary cases.[78] The first paragraph of Article 103 prohibits placing a prisoner of war in pretrial confinement unless a member of the armed forces of the Detaining Power charged with a similar offense would be so confined—but here again there is an exception, this one being applicable "if it is essential to do so in

[72] Miller, *The Law of War* 226.

[73] The entire thesis of Solzhenitsyn's *The Gulag Archipelago* (1973) suggests otherwise. Brockhaus, The U.S.S.R. 292, also suggests doubts—but his article was written in 1956.

[74] U.K., *Treatment* 24.

[75] Professor Cohen finds it "ludicrous" to believe that the PRC could be expected to comply with any of the provisions of the Convention dealing with the subject of penal and disciplinary sanctions Miller, *The Law of War* 247. Cohen goes on to say that "the principles of *nulla poena sine lege* [and, presumably, *ex post facto*], of no coerced confessions, and of opportunity to make a defense and to be represented by qualified counsel are simply not practiced in China." *Ibid.*

[76] With respect to the application of the laws of the Detaining Power concerning offenses punishable by death, *see* pp. 339–340 *infra*.

[77] *See* the discussion of Article 96, the parallel article dealing with disciplinary punishment, at pp. 324–325 *supra*.

[78] *See* pp. 325–326 *supra*.

the interests of national security."[79] It is highly improbable that the national security of a Detaining Power would ever be adversely affected by the failure to place in close confinement a single prisoner of war who is already confined behind the barbed wire of a prisoner-of-war camp. As in the case of disciplinary punishment,[80] this exception merely affords the Detaining Power an excuse for confining a prisoner of war awaiting judicial prosecution when a member of the armed forces of the Detaining Power would not be so confined. And while the first paragraph of Article 103 concludes with an absolute prohibition against pretrial confinement in excess of three months,[81] presumably this provision, too, will be disregarded "in the interests of national security."

Further specific provisions with respect to pretrial confinement include the second paragraph of Article 103 which, like the first paragraph of 90 with relation to displinary punishments, provides for the deduction of the period of pretrial confinement from any sentence ultimately pronounced against the prisoner of war;[82] and the last paragraph of Article 103 which makes the requirements and protections of Article 97 and 98, included in the provisions limited to judicial punishments,[83] fully applicable to pretrial confinement.[84]

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[79] A proposal to delete this provision was rejected at the 1949 Diplomatic Conference with a number of representatives stating their positions with respect to the proposal. 2A *Final Record* 317.

[80] *See* pp. 325–326 *supra.*

[81] This is another method of attempting to bring pressure on the Detaining Power to expedite the reaching of a decision whether to prosecute and to bring the case to trial promptly if trial is the decision reached.

[82] The second paragraph of Article 103 concludes with a clause providing that the period of pretrial confinement shall also be "taken into account in fixing any penalty." A proposal to delete it, made at the 1949 Diplomatic Conference, was not acted upon. 2A *Final Record* 317, 327. This clause is either redundant or requires that the prisoner of war be given dual credit for pretrial confinement. (If the prisoner of war has served two months in pretrial confinement and the court believes that the circumstances of the offense of which he is subsequently found guilty are such that he should receive a one-year sentence, does the sentencing judge take the pretrial confinement "into account in fixing [the]penalty" and sentence the prisoner of war to only 10 months in posttrial confinement? And then does the commanding officer of the place of confinement deduct the pretrial confinement from the sentence actually pronounced, reducing the period to be served to 8 months? This is a logical interpretation of the overall provision, even though it certainly was not the result intended by the Diplomatic Conference.)

[83] For a discussion of the coverage of these two articles, *see* pp. 327–328 *supra.*

[84] Rather strangely, the only prolonged discussion of the provisions of Article 103 at the 1949 Diplomatic Conference was concerned with the right (that was found to exist) of the Detaining Power to transfer to another prisoner-of-war camp a prisoner of war awaiting trial. 2A *Final Record* 312 & 317. That decision was apparently reached without any consideration being given to the difficulties it might create for the defense in preparing a case for trial and in trying it at a substantial distance from the place of the occurrence of the alleged offense.

The routine to be followed before trial is laid out in detail in the Convention. The first paragraph of Article 104 provides that when the Detaining Power decides to proceed with a judicial prosecution against a prisoner of war it shall so notify the Protecting Power. The notification must be received by the Protecting Power at least three weeks before the date that the trial is to begin.[85] Compliance with this provision is jurisdictional,[86] inasmuch as the last paragraph of Article 104 states that unless evidence is presented at the opening of the trial that such notice was received by the Protecting Power, the prisoners' representative, and the accused prisoner of war,[87] the trial must be ad-

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[85] The second paragraph of Article 104 enumerates in detail the information that the notice must contain: (1) specified identity material; (2) the place at which the accused prisoner of war is interned or confined; (3) the charges on which he is to be tried, with the law applicable; and (4) the court in which he is to be tried, with the date and place for the opening of the trial. The third paragraph of Article 104 requires that the same notice be furnished by the Detaining Power to the prisoners' representative. (During World II the United States decided that the requirement of notice to the Protecting Power did not apply to trials by summary courts-martial, the inferior court in the United States hierarchy of courts-martial. SPJGW 1944/1873, 8 April 1949; 3 *Bull. JAG* 135 (1944). While the desire to be able to impose minor punishments promptly was understandable, it is doubtful that such a decision would constitute compliance with Article 104 of the 1949 Convention. However, it is apparently intended to continue with the same interpretation as U.S. Army *Regs.* 655–50, para. 108a provides for such notice only in the case of trial by general or special court-martial.)

[86] *See* U.S. Army *Regs.* 633–50, para. 108d; *British Manual*, para. 222 & n.3. In *Public Prosecutor v. Koi*, [1968] A.C. at 860, the members of the Privy Council, although disagreeing on other issues, were apparently unanimous in finding that the trial court should have, as to one defendant, "refrained from continuing the trial in the absence of notices [pursuant to Article 104]." For a similar decision reached during World War II, see *Rex v. Giuseppe*. During and after World War II the United States Supreme Court held that compliance with the comparable notice provision of the 1929 Convention did not apply to trials for offenses against the law of war (*Johnson v. Eisentrager*), or to trials for precapture offenses (*Matter of Yamashita*). In view of the provisions of Article 85 of the 1949 Convention, compliance with Article 104, as well as all of the other articles relating to judicial prosecution, is now required even when the prosecution is for one of these offenses, if the accused falls within one of the categories specified in Article 4. *See* pp. 379–382 *infra*.

[87] This is the only provision indicating a requirement that a copy of the notice referred to in the first two paragraphs of Article 104 must also be served on the accused prisoner of war. The requirement that particulars of the charge be furnished to the prisoner of war is contained in the fourth paragraph of Article 105. That provision does not include all of the detail of the second paragraph of Article 104, nor does it specify the three-week notice, but merely "in good time before the opening of the trial." However, the last paragraph of Article 104 establishes the fact that a minimum of three weeks is required in order to be "in good time before the opening of the trial."

journed, presumably for a period sufficiently long to complete the proper advance-notice period.[88]

Article 105 is the bill of rights for prisoners of war. A copy of the charges on which he is to be tried, together with any other documentation that, under the law of the Detaining Power, would be furnished to a member of its armed forces being tried under the same circumstances, must be served upon him "in good time before the opening of the trial"[89] and in a language that he understands, while an identical copy thereof must be provided to his counsel (Article 105, fourth paragraph); the accused prisoner of war is entitled to the assistance of a fellow prisoner of war, of qualified counsel of his own choice, and of a competent interpreter if he considers this latter necessary;[90] and he must be advised of these rights by the Detaining Power far enough prior to the trial to make them meaningful and to ensure compliance with other provisions containing time limitations (Article 105, first paragraph); if the prisoner of war cannot, or does not, himself obtain the assistance of counsel, the Protecting Power must do so for him,[91] being allowed one week to accomplish this mission, and being authorized to call upon the Detaining Power for a list of qualified counsel if it so desires; and if the Protecting Power does not select counsel within the time allotted, the Detaining Power is obligated to appoint competent counsel for the prisoner of war (Article 105, second paragraph).[92] Once appointed, counsel for the accused prisoner of war must be allowed a minimum of two weeks prior to the beginning of the trial in which to prepare the defense and he must be afforded ade-

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[88] Concerning the problems related to judicial prosecutions when there is no Protecting Power, see 1 ICRC *Report* 352–64. *See also British Manual*, para. 222 n.3.

[89] The fourth paragraph of Article 105 uses the term "shall be communicated" to the prisoner of war. In the overall context of these provisions, it is clear that this particular communicating must be done in writing. (The "fundamental guarantees" listed in Article 75(4) of the 1977 Protocol I should be read in connection with this paragraph of the text.)

[90] During World War II an opinion of the Judge Advocate General of the United States Army held that, barring a specific request of the accused prisoner of war, it was not necessary that every word of the judicial proceedings be translated for him as long as he knew "the charges and specifications upon which he is arraigned, the general nature of the testimony given for and against him, and the substance of the arguments made by the trial judge advocate [prosecutor] and his counsel." SPJGW 1945/2241, 5 March 1945.

[91] *German Regulations* No. 2, para. 7 provided that if the prisoner of war selected his own counsel, he was to bear the expense; but that if the Protecting Power made the selection, it was to bear the expense. (Of course, in this latter case, the Protecting Power would be reimbursed by the Power of Origin.)

[92] U.S. Army *Regs.* 633–50, No. 109b provides, without qualification, that "at least one United States officer will serve as defense counsel (or assistant) in every general or special court-martial" of a prisoner of war. It is doubtful that such counsel could, or should, serve—even as an assistant—in the face of objection by the accused prisoner of war.

quate facilities for this purpose, being permitted to consult his client freely and in private,[93] and also to interview witnesses for the defense [Article 105, third paragraph].[94]

3. Courts

The basic provisions with respect to the type of courts in which a prisoner of war may be tried are contained in Articles 84[95] and 102. Once again, the standard selected is the national standard of the Detaining Power, Article 102 providing that he must be tried "by the same courts . . . as in the case of members of the armed forces of the Detaining Power" and the first paragraph of Article 84 providing that he may be tried only by a military court unless the "existing laws"[96] of the Detaining Power "expressly permit" the trial of members of its own armed forces by civil courts.[97] Most countries authorize, and will probably prefer to conduct, the trials of prisoners of war in military tribunals.[98] But trying prisoners of war in the same courts that try members of the armed forces of the Detaining Power does not necessarily assure a fair trial for the prisoner of war.[99] Accordingly,

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[93] During World War II the Germans permitted prisoners of war to communicate with their counsel, but only in writing, until the day before trial when a personal conference was permitted. *German Regulations* No. 25, para. 349. The third paragraph of Article 105 remedies a patent defect in the 1929 Convention.

[94] The first paragraph of Article 105 gives the prisoner of war the right to call witnesses. A denial of the trial rights enumerated in the text can constitute a grave breach of the Convention, *See* pp. 363–365 *infra*.

[95] While Article 84 is concerned solely with courts, and therefore has no relevance to disciplinary punishments, it was, for some indiscernible reason, included under the rubric "General Provisions," rather than under the more appropriate "Judicial Proceedings." For this reason it was not mentioned in the discussion of the former.

[96] If the term "existing laws" was used as a method of precluding Detaining Powers from changing their laws in midwar in order to authorize the trials of prisoners of war by civil courts, the purpose was not accomplished.

[97] During World War II several prisoners of war held in Canada were charged, tried, and convicted of the murder of a fellow prisoner of war in a civil court. On appeal, they contended that the civil courts were without jurisdiction. The Supreme Court of Alberta held that under Canadian law not only could the civil courts try Canadian servicemen, but that they had exclusive jurisdiction over the offense of murder. *Rex v. Perzenowski.*

[98] *See, e.g.*, Article 2(9), *Uniform Code;* and Berman & Kerner, *Soviet Military Law and Administration* 106. Article 102 of the Convention is, in effect, a reiteration of the requirement of the first paragraph of Article 84 that prisoners of war may be tried only in the courts that would have jurisdiction to try members of the armed forces of the Detaining Power.

[99] In the post-World War II *Trial of Harukei Isayama* for having executed American airmen after a purported trial that was, in fact, little more than a farce —one that was lacking in every vestige of fairness— the defense argued that the conduct of that trial (false evidence, denial to the defense of the opportunity to obtain evidence, denial of counsel, failure to interpret the proceedings, etc.) was the same that would have been accorded Japanese servicemen. The court obviously did not accept this as a valid defense.

the second paragraph of Article 84 adds some specific requirements with respect to such courts. They must offer the essential guarantees of (1) independence (not subjected to direction by the military commander or civilian executive); (2) impartiality; and (3) the trial safeguards set forth in Article 105.[100]

It is, perhaps, relevant to mention one type of court which is not, and never has been, a legal one—the court created and manned and whose decisions are executed by the prisoners of war themselves. Prisoners of war are subject to the laws and the courts of the Detaining Power for their behavior in the prisoner-of-war camp while they remain in that status; and they are subject to the laws and the courts of their Power of Origin for their behavior in the prisoner-of-war camp when they have returned to the custody of their own armed forces.[101] At no time are they ever legally subject to the jurisdiction of kangaroo courts consisting of fellow prisoners of war.[102]

4. Trial Procedure

The 1949 Convention contains very little with respect to the actual conduct of the trial of a prisoner of war. This is understandable, because in this area the standard procedures established by the laws of the Detaining Power will necessarily govern. There are, however, a few items that warrant discussion.

It has been seen that the trial of a prisoner of war must open with evidence that there has been compliance with the provisions of Article 104 relating to notice to the Protecting Power, the prisoners' representative, and the accused prisoner of war;[103] the last paragraph of Article 105 authorizes representatives of the Protecting Power to at-

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[100] For a discussion of the trial safeguards of Article 105, *see* pp. 334–335 *supra*. In its *Nürnberg Principles*, the International Law Commission was much more terse, but probably just as cogent. Principle V states: "Any person charged with a crime under international law has a right to a fair trial on the facts and law."

[101] *See, e.g.*, Article 105, *Uniform Code;* Article 29, U.S.S.R. Law of December 25, 1958. After Korea the United States tried several members of its armed forces for misconduct while in Communist prisoner-of-war camps. *United States v. Floyd; United States v. Batchelor;* etc.

[102] There were a number of incidents involving fanatical Nazis who tried, convicted, and executed fellow German prisoners of war who were judged to be insufficiently motivated. *See, e.g., Rex v. Werner;* and 5 *Bull. JAG* 262 (1946). (Some years ago considerable publicity was given in Canada to a charge that in Holland in 1945 Canadian troops had provided German prisoners of war with weapons with which to carry out two death sentences imposed by a German prisoner-of-war court. There does not appear to have been any acceptable factual resolution of the charge.) There were many such incidents on the part of fanatical Communists interned in the United Nations Command prisoner-of-war camps in Korea. UNC, Communist War 26–27.

[103] *See* pp. 333–334 *supra*.

tend the trial[104] except when it is held *in camera* "in the interest of State security";[105] the last paragraph of Article 99 provides that no prisoner of war "may be convicted without having had an opportunity to present his defense" and the assistance of qualified counsel; and Article 102 permits the sentencing of a prisoner of war only "if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power," with the further proviso that all of the provisions of the Convention concerned with penal sanctions must have been observed.[106]

It is obvious that these specific trial requirements do not deviate materially from the national standard—unless the national standard is so far below the norm as to leave no doubt that a fair trial is virtually impossible.[107] Even then the Convention assures the prisoner of war undergoing judicial prosecution only of an opportunity to be assisted by counsel, to present a defense, and to have a neutral observer persent—certainly not very far-reaching innovations under the legal systems of most countries.

5. Sentencing

The first paragraph of Article 87, as we have seen, provides that the only punishments that may be adjudged against a prisoner of war shall be those that could be adjudged against a member of the armed forces of the Detaining Power who has committed the same act. The second paragraph of Article 87 provides that in adjudging the punishment, after a prisoner of war has been found guilty of an offense charged, the court of the Detaining Power shall take into consideration the fact that the individual to be sentenced (1) is not a national of the Detaining Power, (2) owes it no duty of allegiance, and (3) is in its power

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[104] During World War II the representatives of the Protecting Power were free to attend all courts-martial of prisoners of war conducted in the United States, but did so on only rare occasions. Rich, Brief History 464.

[105] This is a "national security" exception that Detaining Powers have apparently found it unnecessary to invoke. *Ibid.*

[106] During the course of the discussion of the report of the Sub-Committee on Penal Sanctions by Committee II (Prisoners of War) of the 1949 Diplomatic Conference, the statement was made that the Sub-Committee had decided to include in Article 93 (now 103) "two principles of fundamental justice. One was the right of a prisoner [of war] to a speedy trial, and the other was his right to be considered innocent until he was proven guilty." 2A *Final Record* 312. The first such principle was certainly so included; but nowhere in the article drafted by the Sub-Committee (*ibid.*, 308), or anywhere else in the Convention, is there any provision establishing a presumption of innocence if there is no such presumption in the national law of the Detaining Power. (Article 75(4)(d) of the 1977 Protocol I does require such a presumption.)

[107] Unfortunately, this appears to be the situation in the People's Republic of China. Miller, *The Law of War* 247. *See* note 75 *supra.*

through circumstances beyond his control.[108] It is extremely doubtful that this provision will have any effect whatsoever on the sentences imposed on prisoners of war; indeed, in most trials of prisoners of war, it will be completely irrelevant. When, for example, a prisoner of war assaults or kills a fellow prisoner of war, why should the court take into consideration in the sentencing that he is not a national of the Detaining Power, or that he owes it no duty of allegiance, or that he is not in the prisoner-of-war camp by choice? How does his situation actually differ from that of a national of the Detaining Power who, while a convicted criminal serving a sentence in a penitentiary, assaults or kills a fellow prisoner? Even if the victim is a guard, rather than a fellow prisoner of war, no reason can be discerned for distinguishing the case from that of the prisoner convict. A prisoner of war is certainly not entitled to preferential treatment in the sentencing merely because he is not a national of the Detaining Power and owes it no duty of allegiance,[109] and his status of not being a prisoner of war by choice is identical with that of the prisoner convict who is certainly not in the penitentiary by choice.

When the court reaches a finding of guilty in the trial of a prisoner of war and imposes sentence, it will usually do so in the presence of the prisoner of war concerned. If it does not do so, the first paragraph of Article 107 specifies that the Detaining Power must immediately notify him, in a language that he understands, of the judgment and sentence and of his right of appeal, if any. It must send a "summary communication" containing the foregoing information to the Protecting Power and to the prisoners' representative; and it must thereafter inform the Protecting Power of the decision reached by the prisoner of war with respect to the right of appeal.

Article 106 is directly concerned with the subject of appeals from conviction and sentence. Once again the national standard is adopted: the prisoner of war is given the same rights in this regard as are conferred by the national legislation upon members of the armed forces of the Detaining Power. Moreover, the prisoner of war must be fully advised concerning these rights, including the time limit within which they must be exercised.[110] And, finally, the second para-

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[108] The provision actually includes the term "courts or *authorities* of the Detaining Power" (emphasis added), indicating that it is equally applicable in disciplinary proceedings and judicial prosecutions. It was not mentioned in connection with the discussion of the former because its impact there is considered to be nonexistent.

[109] If he were, then every civilian alien should likewise be entitled to this special treatment when sentenced by a foreign court for the commission of a crime.

[110] The third paragraph of Article 105, establishing the rights and privileges of defense counsel, states that he shall continue to have the benefit of these "until the term of appeal or petition has expired." While the phrase is not notable for its clarity of meaning, presumably he would retain these rights and privileges until the final appeal has been decided.

graph of Article 107 provides that when the conviction becomes final,[111] the Detaining Power shall promptly furnish the Protecting Power with detailed information with respect to (1) the precise wording of the finding and sentence,[112] a summary of the preliminary investigation[113] (if any), and of the trial, "emphasizing in particular" the elements of the "prosecution and the defence";[114] and (3) notification, where applicable, of the confinement facility to which the prisoner of war has been, or will be, sent to serve the sentence.

6. Death Sentences

Because of the propensity of the courts of Detaining Powers to adjudge the death penalty in cases involving prisoners of war without the reluctance frequently displayed by those same courts when sentencing their own nationals, and because of the irreversibility of the sentence when executed, there are several provisions of the Convention concerned with this problem.[115]

The first paragraph of Article 100 requires that prisoners of war and the Protecting Power be informed "as soon as possible" of the offenses punishable by death under the laws of the Detaining Power. Such notification to the Protecting Power early in the conflict will accomplish the double purpose of making the identity of such offenses known to the Protecting Power and, under the second paragraph of Article 100, of freezing the list as of the date of such notification. However, it is a little difficult to grasp the significance of the requirement of notification to the prisoners of war. A number of prisoners of war may be captured every day over a period of years. Must the Detaining Power make a daily announcement of the criminal offenses punishable by death to each new group of prisoners of war? What is the effect if it fails to do so? It would have been far more appropriate, and useful, to provide for posting this information in each prisoner-of-war camp, along with the copy of the Convention and the regulations, orders, and notices that Article 41 requires to be posted.[116]

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[111] This may occur because of the decision of the prisoner of war not to appeal, by affirmance on appeal, by denial of leave to appeal, etc.

[112] Presumably, the "finding" would be "guilty."

[113] It would seem that the material accumulated during the course of the preliminary investigation would have little significance after the trial unless the law of the Detaining Power allows trial on the dossier prepared during that investigation.

[114] It is difficult to conceive of a summary of a trial that would fail to include "the elements of the prosecution and the defence."

[115] Of course, in view of the prohibition contained in the first paragraph of Article 87 against adjudging any penalty except those that could be adjudged against a member of the armed forces of the Detaining Power, this problem will not arise in a Detaining Power that has, by national action, abolished capital punishment.

[116] *See* pp. 165–167 *supra*.

The second paragraph of Article 100, besides freezing the list of offenses punishable by death to those so notified to the Protecting Power, also provides that additions to the list may be made only with the concurrence of the Power of Origin.[117] As to the actual imposition of death sentences, the last paragraph of Article 100 provides that the court must, before pronouncing sentence, specifically have called to its attention the three separate matters that the second paragraph of Article 87 requires it to take into consideration before sentencing in any case: (1) that the prisoner of war is not a national of the Detaining Power; (2) that he owes it no duty of allegiance; and (3) that he is in its power through circumstances beyond his control.[118] The second paragraph of Article 107 requires that as soon as possible after a sentence to death has been adjudged (without regard to the possibility or pendency of an appeal), the Detaining Power furnish to the Protecting Power the detailed notification that is not normally required until after the decision becomes final.[119] And, finally, Article 101 prohibits the execution of the death sentence prior to the expiration of at least six months from the date upon which the Protecting Power actually receives the notification to which reference has just been made.[120]

7. Confinement

A number of the provisions of the Convention with respect to permissible punishments, including confinement, have already been discussed.[121] There are, however, several others that it appears appropriate to mention at this point in the sequence of events in a judicial proceeding.

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[117] Such concurrence would, of course, affect only the prisoners of war who depend on the Power of Origin so concurring.

[118] *See* pp. 337–338 *supra*. In order to give the second paragraph of Article 87 any significance, it too, like the third paragraph of Article 100, should have had the requirement that its provisions be called to the attention of the court.

[119] *See* p. 338 *supra*.

[120] The period of delay was increased to six months from the three months of the second paragraph of Article 66 of the 1929 Convention in order to give the Power of Origin an adequate opportunity to undertake diplomatic negotiations concerning the matter, should it be so inclined. 1947 GE Report 230–31. In 1971 the ICRC proposed the discontinuance of the imposition of capital punishment during the course of hostilities "except of persons found guilty of serious war crimes by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 1971 GE Documentation, VI at 52–53.

[121] *See* pp. 322–324 *supra*.

The first paragraph of Article 108 again adopts the national standard of the Detaining Power—this time for the places in which and the conditions under which the confinement is to be served. The sentenced prisoner of war will serve his sentence in the same type of penal institution and under the same conditions as a member of the armed forces of the Detaining Power;[122] but with certain additional provisions that, in fact, establish an international standard. Thus, Article 108 requires that the conditions of the confinement conform to the requirements of health and humanity;[123] the third paragraph of Article 108 provides that prisoners of war placed in confinement after judicial prosecution continue to have the benefit of the privileges established in Article 78 (the right to make complaints with respect to the conditions of their confinement) and in Article 126 (the right to confer privately with representatives of the Protecting Power); and they must be permitted to send and receive correspondence; to receive at least one relief parcel during each month of confinement; to exercise daily in the open air; to have any medical attention that may be required; to have any spiritual assistance that they may desire; and to have the benefits of the prohibitions on punishments set forth in the third paragraph of Article 87.[124]

Should a prisoner of war who is being judicially prosecuted, or who has already been convicted, become eligible for repatriation or accommodation in a neutral country during the course of hostilities, pursuant to the provisions of Articles 109–114, the second paragraph of Article 115 states that he may only be so repatriated or accommodated if the Detaining Power consents;[125] the third paragraph of Article 115 directs the opposing Parties to exchange the names of prisoners of war detained because of judicial prose-

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[122] In the United States, when the sentence includes a punitive discharge and lengthy confinement, after the discharge has been executed the ex-serviceman is sometimes transferred from the military confinement facility to a Federal prison. Inasmuch as a prisoner of war cannot be sentenced to a discharge and continues to be subject to the military law of the Detaining Power, it would appear that he should not be so transferred.

[123] This requirement of the first paragraph of Article 108 must be read in conjunction with the provisions of the third paragraph of Article 87 prohibiting corporal punishment, imprisonment in premises without daylight, and torture. *See* pp. 322–323 *supra*.

[124] Understandably, the privileges to which they are entitled, beyond those included in the national standard, are perceptibly less than those to which a prisoner of war is entitled when he is confined pursuant to disciplinary sanctions. *See* pp. 327–328 *supra*. However, it is not easy to understand why the prohibitions against punishments that are inhuman, brutal, or dangerous to health, contained in the last paragraph of Article 89, were not made applicable to judicial punishment as they are to disciplinary punishment.

[125] *See* pp. 413 and 415 *infra*.

cution or conviction. Similarly, the penultimate paragraph of Article 119 provides that when repatriation takes place upon the termination of hostilities, a prisoner of war against whom a judicial prosecution for "an indictable offense" is pending, or who has already been convicted of such an offense, may be detained until the end of the proceedings and until the completion of punishment.[126] And, once again, the last paragraph of Article 119 directs the opposing Parties to exchange the names of prisoners of war so detained.

E. CONCLUSIONS

In the nature of things, prisoners of war have frequently been the victims of injustice at the hands of their captors, such injustice varying from the extreme of a complete denial of all of the judicial guarantees recognized as indispensable by the great majority of national groupings of civilized people to the almost completely unavoidable human situation of the biased judge. The draftsmen of the 1949 Convention, building on the precedent of the 1929 Convention and the practices of World War II, attempted to draft provisions that would ensure, to the maximum extent possible, fair treatment to the prisoner of war charged by his captors with misconduct, whether of a minor disciplinary or of a major criminal nature. In the heat of armed conflict it requires strong measures to ensure fair treatment by the captors of the enemy who have fallen into their power. It is doubtful that it will become evident in practice that the draftsmen were as successful in this area of the Convention as they were in others.

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[126] *See* p. 420 *infra*. Of course, although not specifically mentioned in the fifth paragraph of Article 119, as it is in the second paragraph of Article 115, there would be no problem if the Detaining Power consented to the repatriation of the prisoner of war despite the pending proceedings or the conviction. (Concerning the Chinese Communist attempt to apply the provisions of the fifth paragraph of Article 119 in Korea, despite the provision of the Armistice Agreement for the repatriation of *all* prisoners of war, see note VII-128 *infra*.)

CHAPTER VI

PENAL SANCTIONS FOR MALTREATMENT OF PRISONERS OF WAR

A. INTRODUCTORY

At the very beginning of this volume attention was invited to the general lack of protection available to the prisoner of war from the early days of recorded history until the eighteenth and nineteenth centuries.[1] By the latter period, not only had the theoretical basis been laid for the rule that prisoners of war were honorable men reduced by the power of arms to an unfortunate status[2] and that they were entitled to be protected from death and inhuman treatment by their captors, but also for the principle that those who were guilty of treating prisoners of war inhumanely were subject to punishment for their actions. This principle made its first formal appearance in the 1792 Decree of the French National Assembly.[3] It was greatly amplified in Lieber's Code,[4] and records exist of at least three major trials that took place at the end of the American Civil War (1861–65) in which the accused were charged with maltreatment of prisoners of war. In the fall of 1865, Captain Henry Wirz, formerly of the Confederate army, was tried by a Federal military commission for the cruel treatment and unlawful killing of prisoners of war who had been in his custody at the Andersonville, Georgia, prisoner-of-war camp.[5] He was convicted, sentenced to death, and hanged. One of his civilian employees, James W. Duncan, was tried for the same offense in 1866, was convicted,

[1] *See* pp. 2–8 *supra.*

[2] *See* note I-18 *supra.*

[3] *See* note I-20 *supra.*

[4] *See* note I-28 *supra.* Two other relevant articles of the Lieber Code read as follows:

Article 59

A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

Article 71

Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

[5] 8 *Am. St. Trials* 657, *reprinted in part in* 1 Friedman 783. *See also* note I-26 *supra.*

and was sentenced to imprisonment at hard labor for 15 years. And Major John H. Gee, also formerly of the Confederate army, was tried in 1866 for the failure to take proper care of Federal prisoners of war in his charge at Salisbury, North Carolina, and for causing the death of several. He was acquitted.[6]

Despite the precedents which had thus been established,[7] and despite the great stride forward in regularizing the laws and customs of war earlier accomplished by the adoption of the 1864 Geneva Red Cross Convention, the 1899 Hague Regulations contained no provisions for penal sanctions for the killing or inhumane treatment of prisoners of war and, except for a provision for the pecuniary responsibility of the offending State, the same was true of the 1907 Hague Regulations.[8] Both of these conventions did contain provisions requiring that prisoners of war be humanely treated, and prohibiting the killing or wounding of those who had surrendered, but the events of World War I clearly demonstrated the inadequacy of such provisions standing alone.[9] In its Report, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, created by the Preliminary Peace Conference in January 1919, listed, in addition to a number of general offenses, some of

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[6] Winthrop, *Military Law* 1233 n.5. Winthrop states (at 1233): "[A]ny individual officer resorting to or taking part in such act [of putting a prisoner of war to death] or [in unlawful, unreasonably harsh, or cruel] treatment is guilty of a grave violation of the laws of war, for which, upon capture, he may be made criminally answerable."

[7] The Oxford Manual had also contained a provision in its Article 84 for the punishment of persons who violated the law of war.

[8] Just a few years before, the 1902 Treaty of Vereeniging, ending the Boer War, had contained, in its Article IV, a provision for the trial by British courts-martial of Boers who were alleged to have committed violations of the law of war. With respect to the 1907 Hague Regulations, the following statement appears in Pictet, *Commentary* 617: "States were left entirely free to punish or not acts committed by their own troops against the enemy, or again, acts committed by enemy troops, in violation of the laws and customs of war. In other words, repression depended solely on the existence or non-existence of national laws repressing the acts in question." Inexplicably, the 1906 Geneva Red Cross Convention had contained a chapter entitled "Repression of Abuses and Infractions," and the abuses and infractions against which the Parties were called upon to legislate in Article 28 thereof included "ill treatment of the sick and wounded of the armies"; and the 1929 Geneva Red Cross Convention had contained a similarly titled chapter by the provisions of Article 29 of which the Parties were required to legislate against "all acts in contravention of the provisions of the present Convention"; but the 1929 Prisoner-of-War Convention contained no such provisions.

[9] In 3 Hyde, *International Law* 1845, the author stated: "The conduct of Germany and her allies in the course of World War I, as well as participants in some subsequent conflicts, has served to emphasize the fact that prisoners of war may still be subjected to the caprice and malice of a captor whose passions differ in no wise from those of the Carthaginian or Goth, and from the violence of which no regulations are likely to assure adequate protection."

which could apply to prisoners of war as well as to others, two offenses specifically directed against maltreatment of prisoners of war: ill-treatment of wounded and prisoners of war; and employment of prisoners of war on unauthorized works.[10] Although the American and the Japanese members of the Commission filed reservations to certain portions of the Report, the representatives of all 10 of the member nations composing the Commission concurred in the portion recommending the imposition of penal sanctions against those responsible for violations of the laws and customs of war, including those relating to the protection of prisoners of war; and Article 128 of the Treaty of Versailles contained a recognition by Germany of the right of the Allies "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."[11]

While the 1929 Convention included provisions relating to many areas not covered by the earlier 1899 and 1907 Hague Regulations, and has been described as "an instrument which lays upon the Detaining Power considerably more obligations towards its captive, than it requires from the captive towards the captor,"[12] and while it does contain provisions requiring the humane treatment of prisoners of war, once again no specific penal sanctions were provided for violations of this requirement.[13] Whether or not the incorporation of provisions for such sanctions into that Convention would have acted as a deterrent during World War II is entirely a matter of opinion. However, if we are to accept the basic theory of all penal codes, there are at least some individuals who would have been deterred from illegal activities by the knowledge that punishment for certain acts was specifically prescribed in a widely publicized treaty to which they were

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[10] 14 *A.J.I.L.* 95. 115. It is interesting to note that in its "Report" the Commission on the Responsibility said (at 14 *A.J.I.L.* 121):

> Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into its power.

[11] The manner in which this program failed, and the reasons therefor, are discussed in Marin, *Recueil* 684–86 and in UNWCC *History* 46–52. The classical presentation of the trials which did take place in Germany is to be found in Mullins, *The Leipzig Trials.* The German attitude towards these trials is presented in Gallinger, *The Countercharge: the Matter of War Criminals from the German Side.* Seven of the twelve cases tried at Leipzig involved some type of maltreatment of prisoners of war.

[12] 1 ICRC *Report* 218.

[13] *See* note 8 *supra.* The I.M.T. had no difficulty in reaching the conclusion that "violations of these provisions [of the 1907 Hague Regulations and of the 1929 Geneva Convention] constituted crimes for which the guilty individuals were punishable." *I.M.T.* 497.

subject.[14] Be that as it may, the fact remains that there were no such specific provisions for penal sanctions when World War II began, and that the treatment of prisoners of war (particularly the treatment of Russian prisoners of war by the Germans[15] and the treatment of all enemy prisoners of war by Japan[16]) was, generally, so barbaric

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[14] Provisions for penal sanction for the maltreatment of prisoners of war are obviously not a panacea which will automatically extirpate all activities of this nature. That is not the history of any penal legislation. However, they do act as a deterrent for some and they do provide a firm base for the punishment of offenders, something which has heretofore been lacking. At the 1949 Diplomatic Conference the Netherlands delegate (Mouton) took the position, one that is particularly applicable to a code dealing with the law of war, that "an international convention had no strength without the possibility to enforce it, had no strength without sanctions." 2B *Final Record* 31.

[15] Dallin, *German Rule* 414; *I.M.T.* 473–75. It would be appropriate to quote here the portion of the IMT's opinion (at 475) setting forth the now historic exchange that took place between German Admiral Canaris (Chief of German Intelligence) and German General Keitel (Hitler's personal Chief of Staff):

> On the 15th September 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war signed by General Reinecke on the 8th September 1941. He then stated:
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> > The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people. . . .The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.
>
> This protest, which correctly stated the legal position, was ignored. The defendant Keitel made a note on this memorandum:
>
> > The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.
>
> In Keitel's case the Tribunal adjudged the sentence of death, which was executed.

[16] 10 *Dept. State Bull.* 145 (1944); *I.M.T.F.E.* 1002. The latter stated:

> Ruthless killing of prisoners [of war] by shooting, decapitation, drowning, and other methods; death marches in which prisoners [of war] including the sick were forced to march long distances under conditions which not even well-conditioned troops could stand, many of those dropping out being shot or bayonetted by the guards; forced labor in tropical heat without protection from the sun; complete lack of housing and medical supplies in many cases resulting in thousands of deaths from disease; beatings and torture of all kinds to extract information or confessions or for minor offenses; killing without trial of recaptured prisoners after escape and for attempt to escape; killing without trial of captured aviators; and even cannibalism; these are some of the atrocities [against prisoners of war] of which proof was made before the Tribunal.

as to turn the calendar back many centuries.[17]

During the course of World War II there were a number of official declarations made by the Allied leaders to the effect that the punishment of war criminals was one of the major objectives of the war.[18] These culminated in the 1943 Moscow Declaration and in the 1945 Potsdam Declaration.[19] In the latter it was specifically stated that "stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners." In addition, on a number of occasions during the course of the war, protests were submitted through the Protecting Powers concerning maltreatment of prisoners of war and other violations of the 1929 Convention.[20] In October 1943 the United Nations War Crimes Commission was established with the primary mission of investigating and perpetuating evidence of war crimes and of formulating the procedures necessary to insure the trial and punishment of war criminals.[21] There was, then, adequate warn-

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[17] Estimates of prisoner-of-war mortality during World War II are as varied as they are numerous. One estimate places the total number of Soviet soldiers captured by the Germans at 5,000,000 and the total number of survivors at only 1,000,000. Dallin, *German Rule* 426. Another estimate is that 2,300,000 Russians died "du typhus" in the prisoner-of-war camps maintained by the Germans, and that in those maintained by the Japanese the allied mortality was 16,000 out of 46,000. Rousseau, *Droit international public* 563. (In all fairness, however, it must be pointed out that the same author estimates that in the prisoner-of-war camps maintained by the Soviet Union the mortality was 1,321,000 out of 3,700,000 Germans; 63,000 out of 75,000 Italians; and 150,000 out of 615,000 Japanese.) Some of the most authoritative figures are probably those set forth by the *I.M.T.F.E.* (at 1002–03):

> Of United States and United Kingdom forces 235,473 were taken prisoner by the German and Italian Armies; of those, 9,348 or 4 per cent died in captivity. In the Pacific Theater 132,134 prisoners were taken by the Japanese from the United States and United Kingdom forces alone of whom 35,756 or 27 per cent died in captivity.

[18] *See generally* UNWCC *History* 87–108.

[19] 9 *Dept. State Bull.* 310–11 (1943); and 13 *ibid.*, 137 (1945), respectively.

[20] *See, e.g.*, the Molotov Note of 7 November 1941, UNWCC *History* 88–89; and 10 *Dept. State Bull.* 145 (1944) where the following is stated with respect to one of the protests:

> In that protest the Department again called upon the Japanese Government to carry out its agreement to observe the provisions of the convention and warned the Japanese Government in no uncertain terms that the American Government would hold personally and officially responsible for their acts of depravity and barbarity all officers of the Japanese Government who have participated in their commitment and, with the inexorable and inevitable conclusion of the war, will visit upon such Japanese officers the punishment they deserve for their uncivilized and inhuman acts against American prisoners of war.

The protest referred to above also summarized the specific articles of the 1929 Convention which the Japanese were alleged to have violated. 10 *Dept. State Bull.* 168–75. A number of these notes of protest are reproduced *in extenso* under the caption "Japanese Atrocities" in 13 *Dept. State Bull.* 343–57 (1945).

[21] UNWCC *History* 112–34.

ing that the Allies intended to impose penal sanctions against individuals guilty of the maltreatment of prisoners of war. We shall have occasion later in this chapter to review a few of the many trials of individual war criminals which followed the termination of hostilities in 1945.[22] And each of the judgments rendered after the trials conducted before both the International Military Tribunal at Nuremberg in 1945–46 and the International Military Tribunal for the Far East at Tokyo in 1946–47 is based, in part, upon the murder and ill-treatment of prisoners of war.[23]

Shortly after the conclusion of World War II the late Dr. Ernst H. Feilchenfeld of Georgetown University found that he had quite a few former prisoners of war available on the campus for direct-research purposes. He took advantage of this situation to probe deeply into a number of specific facets of the prisoner-of-war problem. One of his major conclusions was that "[i]t is one of the greatest weaknesses of the existing rules on prisoners of war that they do not contain definite and written provisions on sanctions. There should be sanctions and they should be written into a new convention."[24] Apparently, this need for "statutory" provisions to repress violations of the proposed new conventions, including that pertaining to prisoners of war, was generally recognized and the draft prisoner-of-war convention presented by the ICRC to the 1948 Stockholm Conference contained a proposed article on the subject.[25] However, the Stockholm Conference found the proposal inadequate, and adopted a resolution requesting the ICRC to continue its work in this area so as to be able to submit to the impending Diplomatic Conference a more far-reaching proposal with respect to penal sanctions for violations of the convention.[26]

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[22] While exact statistics have never been accumulated, it is probable that something in excess of 2,000 separate trials were conducted by the various Allies in Europe and in the Far East. (Of course, many of these involved victims other than prisoners of war, and most of them involved more than one accused.) One table, which does not purport to be complete, lists 1,911 trials. 15 *LRTWC* xvi. Of the 89 cases actually reported in *LRTWC*, 49, or 55 per cent, involved some prisoners of war as victims. Unfortunately, few of these statistics include any data with respect to the number or the nature of war crimes trials conducted in the Communist countries.

[23] *I.M.T.* 471 & 475; *I.M.T.F.E.* 1024–1136, *passim.*

[24] Feilchenfeld, *Prisoners of War* 89. He also stated (at 91): [I]t would be an improvement if a new convention on prisoners of war contained in one chapter a whole criminal code dealing with acts to be treated as war crimes. This code should contain clear definitions and be sufficiently specific. Professor Quincy Wright suggests a code defining as concretely as possible the various crimes against prisoners of war." For a somewhat similar suggestion made after Warld War I, *see* Phillimore & Bellot 62.

[25] Article 119 of that draft included several of the provisions now appearing in Article 129 of the Convention. *Draft Revised Conventions* 134. It derived basically from Article 29 of the 1929 *Wounded-and-Sick Convention. See* note 8 *supra.*

[26] Resolution XXIII, Report of the XVIIth Conference 76, 94.

The ICRC complied with that request and proposed several new articles containing both substantive and procedural provisions.[27] The proposal containing the substantive provisions was amended and adopted by the 1949 Diplomatic Conference, ultimately becoming Article 130 of the 1949 Convention.[28] The proposals containing the additional procedural provisions received a cooler reception, none of them being accepted *in toto*, although a few portions thereof did survive to be incorporated elsewhere in the Convention.

As a result of the foregoing actions, the 1949 Convention contains provisions listing the specific acts of maltreatment considered to be major ("serious" or "grave") violations of the Convention;[29] and separate provisions calling upon the High Contracting Parties to ensure that their statute books contain legislation establishing penal sanctions both for such major violations and for all other violations of the provisions of the Convention.[30] In view of the rapidity with which both sides in the Korean hostilities announced that they would comply with the 1949 Convention,[31] the world was warranted in anticipation that the treatment of prisoners of war in that armed conflict would be exemplary and that the need for resort to penal sanctions would be minimal. Unfortunately, such was not the case. Numerous instances of the commission of many of the grave breaches of the Convention enumerated in Article 130, including the murder of prisoners of war, began to come to light as early as September 1950, as soon as troops of the United Nations Command moved into territory previously held by the North Koreans.[32] At the time of the

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[27] Article 119, 119(a), 119(b), and 119(c). Remarks and Proposals 64–65.

[28] *See* 3 *Final Record*, Annex 49, at 42. The listing of the specific offenses which were to constitute "grave breaches" of the Convention, proposed in Article B of that Annex, was adopted by the 1949 Diplomatic Conference as Article 130 with only stylistic changes. It should not be overlooked that Article 13 also lists a number of substantive offenses which are designated "serious" breaches of the Convention. *See* note 42 *infra*.

[29] Articles 13 and 130, respectively.

[30] The first and third paragraphs of Article 129, respectively.

[31] In July 1950 the Foreign Minister of the Democratic Republic of Korea (North Korea) sent a message to the United Nations Secretary-General stating that its forces were "strictly abiding by principles of Geneva Conventions [*sic*] in respect to Prisoners of War." 1 ICRC, *Conflit de Corée*, No. 16. For the commitments made by the United States and the Republic of Korea, *see ibid.*, Nos. 12 and 15, respectively. For the commitments made by the Governments of the other forces comprising the United Nations Command, *see, ibid.*, Nos. 20–46.

[32] For some of the major violations of the law of war and of the provisions of the 1949 Convention which began to come to light beginning in September 1950, *see* U.S. Congress, *Korean War Atrocities*, *passim*. Concerning the method by which the United Nations Command proposed to take judicial action against the identified culprits, see note V-24 *supra*.

signing of the Armistice Agreement in July 1953, the United Nations Command had identified and was holding several hundred Communist prisoners of war, both North Korean and Chinese, for trial for pre-capture offenses committed against United Nations Command prisoners of war. Under the provisions of the Armistice Agreement relating to the repatriation of prisoners of war, it was necessary to repatriate these individuals without the imposition of the punishment which many of them undoubtedly deserved.[33]

It is obvious, then, that Korea did not provide a valid proving ground for these new provisions of the 1949 Convention dealing with penal sanctions for violations.[34] Whether a future international armed conflict in which any Communist countries involved are formally Parties to the Convention will prove any different is a matter of conjecture.[35] Certainly, the many brutal atrocities against prisoners of war committed by the North Koreans, and the numerous more

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[33] When India finally agreed late in 1973 to repatriate the Pakistani prisoners of war whom she had held for a period of two years after the complete cessation of hostilities, some 195 were at first denied repatriation and were retained for trial for war crimes by Bangladesh. As they were ultimately repatriated without trial, it is not possible to state the exact nature of the war crimes that they were alleged to have committed. Because Bangladesh, rather than India, was the intended prosecutor, it is probable that the allegations concerned civilians rather than prisoners of war.

[34] It will perhaps have been noted that throughout this study it has unfortunately been necessary, on numerous occasions, to state that international armed conflicts in which Communist nations were involved have not provided valid proving grounds for the various provisions of the Convention. In some such conflicts the applicability of the Convention has been denied by them despite the specific provisions of Article 2; in others they have merely systematically disregarded and violated the Convention as a matter of national policy, usually at the same time charging their adversaries with such conduct. For some specific examples, *see* notes 35, 36, and 63 *infra*.

[35] The events in Vietnam are not helpful, as the North Vietnamese denied that the Convention was applicable (*see* note I-68 *supra;* see also Levie, Maltreatment in Vietnam 330) and the Vietcong denied that they were bound by its provisions (5 *I.R.R.C.* 636 (1965)). However, as we have seen, the requirement of humane treatment of prisoners of war long predates the 1949 Convention and has undoubtedly become a part of the customary international law of war. *See* p. 343 *supra*. It is therefore unpleasantly illuminating to read the following statement made by one of the American prisoners of war (Frishman) released by the North Vietnamese in August 1969, during the course of the hostilities, as an indication of their humanitarian point of view:

> All I'm interested in is for Hanoi to live up to their claims of humane and lenient treatment of prisoners of war. I don't think solitary confinement, forced statements, living in a cage for three years, being put in straps, not being allowed to sleep or eat, removal of finger nails, being hung from a ceiling, having an infected arm which was almost lost, not receiving medical care, being dragged along the ground with a broken leg, or not allowing an exchange of mail to prisoners of war are humane. AEI, Problem 26, *See also* note II-145, *supra*.

subtle, but equally reprehensible, violations of the provisions of the Convention committed by the Chinese Communists, do not augur well for the future.[36]

It may be stated that in the course of the evolution of the law of war a "common law" of penal sanctions evolved under which punishment was imposed on offenders for maltreatment of prisoners of war as well as for other violations of the law of war. This was not a wholly satisfactory solution, as it encouraged the argument that the imposition of such sanctions violated the maxim *nullum crimen sine lege, nullum poena sine lege*—no punishment without a preexisting law. [37] This is not to say that the trials for conventional war crimes conducted after World War II fell within this prohibitory maxim.[38] The offenses which were the subjects of such trials were violations of the law of war which were punishable under that law at the times of their commission.[39] Moreover, the individuals tried for killing prisoners of war were actually being tried for some type of unjustifiable homicide; and the individuals tried for physically maltreating prisoners of war by torture, beating, using them as medical guinea pigs, etc., were actually being tried for assault and battery, or aggravated assault, or maiming, etc. In very rare instances will it be found that

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[36] According to U.K. *Treatment* 31, the Chinese Communists in Korea asserted:

> Prisoners of war were common people who had been duped by their reactionary governments. Those who did not recognize the "truth" of this assertion and argued that they were entitled to the provisions of the convention were sharply told that they were "war criminals" and entitled to nothing—except shooting. For referring to the convention men were struck, threatened and made to stand at attention for long periods.

And again (at 32):

> [T]he Chinese in Korea, by simply maintaining that all soldiers fighting for their "*bourgeois*" or "imperialist" opponents were, *ipso facto* "war criminals," succeeded to their own satisfaction in justifying their complete disregard of the convention. One prisoner [of war] was told by a Chinese interrogator that the Prisoner-of-War Convention was fully observed by the Chinese. "but only after the prisoner had reached a stage of full repentance for his past crimes." Fighting against the Chinese was the most heinous of these crimes.

This is almost exactly what had been forecast 15 years earlier as the treatment of prisoners of war to be expected from the Soviet Union, then the only Communist nation. Taracouzio, *Soviet Union* 321. For actual Soviet practices during World War II, *see* Richardson, Prisoners of War as Instruments of Foreign Policy 47. Upon the death of Japanese Prince Fumitaka Konoye in 1956 in the Soviet Union, where he had been held since his capture in 1945 while serving in the Japanese army, the Japanese Foreign Office announced that it had learned that he had died while serving a sentence adjudged upon his conviction in 1951 of having committed the war crime of "supporting capitalism." *New York Times*, 11 December 1956 at 8, cols. 3–4.

[37] Discussions in depth of the subjects of *nullum crimen sine lege, ex post facto*, the defense of superior orders, etc., will be found throughout the voluminous literature with regard to the post–World War II war crimes program.

[38] 15 *LRTWC* 166–70.

[39] *I.M.T.* 461–62; *I.M.T.F.E.* 1103–04.

an individual was tried for a violation of the law of war as to which there was no comparable offense among the penal statutes of the vast majority of the States then constituting the world community of nations. Nevertheless, it is, of course, preferable from legal, sociological, and penological points of view to have specific coverage of these matters included in a binding international agreement such as the 1949 Convention.[40] It therefore behooves us to investigate the extent to which the provisions of the Convention, and the penal laws of most nations, affirmatively remedy the situation with respect to those violations of the laws and customs of war involving the maltreatment of prisoners of war.[41]

B. SUBSTANTIVE OFFENSES

Although it has become customary to refer to Article 130 as the "grave breaches" provision of the Convention, it is essential that consideration be given to the provisions of Article 13 at the same time. While the first paragraph of Article 13 uses the term "serious breach," rather than "grave breach," this does not appear to constitute a distinction.[42]

The first sentence of Article 13 is really the fundamental principle of the Convention, the one which is repeated either explicitly or implicitly throughout the Convention—prisoners of war must be humanely treated.[43] The offenses specified in Articles 13 and 130 are

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[40] Most legal systems will still require national laws to implement the Convention's provisions. See the discussion of SUBSTANTIVE OFFENSES, immediately below.

[41] It must be borne in mind that we are here concerned solely with the provisions of the Convention relating to the trial and punishment of individuals, whatever their prior or current status, who are allegedly guilty of the maltreatment of prisoners of war.

[42] Article 133 provides that the English and French versions of the Convention are equally authentic. In the French version the word "grave" is employed in both Articles 13 and 130. While one unsuccessful attempt was made to adopt uniform language in another aspect of these two articles (see pp. 358–359 *infra*), no attempt was made to eliminate the discrepancy, if it be one, with respect to the use of the different words "serious" and "grave" appearing solely in the English version to categorize the types of breaches proscribed by Articles 13 and 130, respectively. Article 85(1) of the 1977 Protocol I refers to "[t]he provisions of the Conventions relating to the repression of breaches and grave breaches."

[43] The requirement for humane treatment of prisoners of war has been termed the "basic theme" (Pictet, *Commentary* 140), the "touchstone" (AEI, Problem 4) of the Convention. It is a standard enunciated by the Prophet Muhammad in the seventh century. Erekoussi. The Koran and the Humanitarian Conventions, 2 *I.R.R.C.* 273, 277. Occurrences during the 1973 Arab-Israeli War, involving the wilful killing and inhuman treatment of Israeli prisoners of war by the Syrians and Egyptians, charged by Israel [Israeli Ministry for Foreign Affairs, Defenceless; Blaustein and Paust, On POW's and War Crimes, 120 *Cong. Rec.* 1779 (1974)) would seem to raise a question as to whether the humanitarian admonitions of the Prophet are still being followed.

merely those that have been determined to be the major violations of that principle.[44] There can, of course, be innumerable violations of the Convention other than those considered to be so important as to warrant specific mention.

In effect, the Convention places a number of offenses committed against prisoners of war in the category of "grave breaches," thereby making them offenses which the contracting parties are under an obligation to punish or to assist in punishing, regardless of the nationality of the offender. And so obviously serious are the offenses enumerated, that there can be no possible quarrel with the statement contained in the report of the committee of the 1949 Diplomatic Conference that only those offenses had been included "which no legislator would object to having included in the penal code."[45] While it is possible to apply a variety of methods in subdividing the substantive offenses listed in Articles 130 and 13, we will here consider and discuss them in the context of those appearing in both Articles—those appearing only in Article 130, and those appearing only in Article 13.[46]

1. Wilful Killing

This is murder—an offense under the military and civilian penal codes of every civilized nation. It is the offense against prisoners of war that has been most frequently punished in the past. It was prohibited by Article 23c of both the 1899 and the 1907 Hague Regulations, although neither of those codes provided for penal sanctions for violations thereof. However, in the notes on *The Dreierwalde*

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[44] There was some discussion at the 1949 Diplomatic Conference of a proposal to use the term "serious *crime*" in the first paragraph of Article 13. 2A *Final Record* at 349 (emphasis added). This proposal was discarded because it was felt to be inappropriate to refer to "crimes" in an Article setting forth the basic requirement of humane treatment. *Ibid.*, 563. In view of the overall content of the Article, this was strange reasoning. However, even if it is determined that the acts or omissions enumerated in Article 13 that are not specifically repeated in Article 130 are not separate grave breaches of the Convention, it would appear apodictic that, at a minimum, a violation of any of the prohibitions of Article 13 would constitute a violation of the substantive offense of "inhuman treatment" listed in Article 130. The ICRC's official interpretation of the Convention affirmatively states both that "[t]he principal elements of humane treatment are . . . listed in the Article [13]" (Pictet, *Commentary* 140), and that Article 13 specifies "certain acts which constitute grave breaches." *Ibid.*, 143.

[45] 2B *Final Record* 115. They would also be criminal violations of the law af war under the definition of war crimes enunciated in Lauterpacht, The Law of Nations and the Punishment of War Crimes. 21 *B.Y.I.L.* 58, 79.

[46] While this author believes that the "serious breaches" of the first paragraph of Article 13 and the "grave breaches" of Article 130 should be considered as being equally within the purview of Article 129 (the procedural Article), admittedly States have not so dealt with them. For example, section 1(1) of the United Kingdom's *Geneva Conventions Act*, 1957, specifically provides only for punishment for the commission of the grave breaches enumerated in Article 130 of the Convention and does not mention Article 13 thereof.

Case, the United Nations War Crimes Commission concluded that the killing of prisoners of war constituted a criminal violation of the law of war under customary international law even before the 1907 Hague Regulations became effective.[47] This seems to have been the general consensus as we find that, after World War II, the courts of the countries trying war crimes cases, whether of common law or of civil law heritage, uniformly applied penal sanctions in cases involving the killing of prisoners of war.[48] It appears beyond dispute that in including the offense of "wilful killing" of prisoners of war among the grave breaches of the Convention which are specifically subject to penal sanctions, the drafters of the 1949 Convention were merely continuing in complete conventional form what had previously been based on a combination of customary and conventional law.

The contention has been advanced that the term "wilful killing" includes death caused by faults of omission *provided* that the omission was wilful and was intended to cause death.[49] While there may be some controversy in connection with the basic premise, with the provisory clause it is somewhat difficult to see how the death could be deemed to have resulted from a fault of omission. The examples given to support the contention—reduction of food rations to a point where deficiency diseases cause death, and putting to death as a reprisal despite the fact that reprisals against prisoners of war are specifically prohibited— can scarcely suffice for that purpose. An execution knowingly and wilfully performed as a reprisal—reprisals being specifically prohibited—would certainly be a wilful killing, but by an act of commission, not by an act of omission. And the reduction of the food ration to a point which would not support life, if done wilfully and intentionally and not because of circumstances beyond the control of the offender, would probably constitute both a wilful killing by a specific act of commission and the offense of "wilfully causing great suffering or serious injury to body or health," which is hereinafter discussed.[50]

In addition to the "grave breach" of wilful killing specified in Article 130, there is also the "serious breach" specified in Article 13 consisting of "any unlawful act or omission by the Detaining Power

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[47] 1 *LRTWC* 81, 86. *See, e.g.*, note 4 and note I-28 *supra*. *See also* Digest, 15 *LRTWC* 99, and Winthrop, *Military Law* 1233.

[48] *See, e.g.*, U.S.: *The Dostler Case* and *The Jaluit Atoll Case;* U.K.: *The Essen Lynching Case* and *The Stalag Luft III Case;* Canada: *The Abbaye Ardenne Case;* France: *Trial of Robert Wagner* (reversed on jurisdictional grounds) and *Trial of Carl Bauer*. *See also I.M.T.* 471–72; *I.M.T.F.E.* 1002; and Kalshoven, *Belligerent Reprisals* 191. *See also* the discussion of Article 121 at p. 397 *infra*, and of Article 42 at pp. 403–404 *infra*.

[49] Pictet, *Commentary* 626–27. *See also* 1971 GE Documentation, II at 38 n.107. *But see Pal Dissent* 1158; and 1971 GE Report, para. 568.

[50] *See* pp. 360–361 *infra*.

causing death." Several comments concerning that provision appear appropriate: first, while the phrase "causing death" may have been intended to be coextensive with the Article 130 grave breach of "wilful killing," this is not so, as the latter offense is more restricted than the former (for example, the Article 13 offense would include causing death by negligence, death resulting from the use of excessive force to prevent escape, death resulting from the failure to protect a prisoner of war from the violence of civilians, etc.); second, the objections voiced above concerning acts of omission are obviously not applicable here where the definition given specifically includes acts of omission and does not include either "wilfully" or "knowingly"; and third, while the provision refers to unlawful acts or omission *of the Detaining Power*, the latter acts through human agents and the responsible individuals are the ones who will suffer punishment for the offenses which they have committed or ordered to be committed.[51]

2. Torture or Inhuman Treatment, Including Biological Experiments

a. INHUMAN TREATMENT

The prisoner-of-war codes of 1899, 1907, and 1929 all provided for the humane treatment of prisoners of war, but none of them contained sanctions for inhumane treatment. This omission has now been rectified. As we have just seen, Article 13 of the 1949 Convention provides, in pertinent part, that "prisoners of war must at all times be humanely treated." Article 130 makes "inhuman" treatment a grave breach of the Convention. From the phraseology employed in Article 130, both in English and in French, it would seem that the draftsmen intended the above-captioned items to describe only one offense;[52] and it is probable that this is so, with inhuman treatment being the broad term within which the other two items fall, specific mention being made of torture and of the use of prisoners of war as human guinea pigs because, unfortunately, these two offenses occurred with such

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[51] The I.M.T. properly stated (at 466) that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

[52] The 1956 Commission of Experts (convened solely to study the problem of grave breaches) made this comment:

> The Commission noted that the framers of the Conventions had considered torture and inhuman treatment to be different aspects of one and the same "grave breach," which also comprised biological experiments. In the Experts' opinion, all acts or omissions that led to great moral suffering or caused serious deterioration in the victim's mental condition should also be comprised in that "grave breach."

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alarming frequency during World War II.[53] However, for the purposes of this discussion, which is enumerating offenses against prisoners of war not only from the point of view of the Convention, but also from the point of view of the national penal codes under which they will be prosecuted, torture and biological experiments will be treated as separate offenses.

The captioned provision leaves open for interpretation the question as to exactly when maltreatment, other than torture or biological experiment, becomes inhuman. It seems clear that this is a decision which it will be necessary for the national courts concerned to reach on a case-by-case basis.[54] Inasmuch as national standards vary greatly, it can be assumed that problems will arise in this area. It is worthy of note that the 1956 Commission of Experts arrived at the conclusion, in which the ICRC apparently concurs, that, for maltreatment to constitute the grave breach of inhuman treatment, it is not necessary that it involve an attack on the physical integrity or health of a prisoner of war but that it includes moral suffering.[55] While such an interpretation, if followed in trials for alleged grave breaches of this category, will be of some assistance in determining that a particular

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[53] Of course, the offense of inhuman treatment includes many other acts besides torture and the use of prisoners of war as human guinea pigs.

[54] Post–World War II cases in which national courts had no great difficulty in finding punishable maltreatment include: *Trial of Babao Masao* (death march), *Trial of Tanaka Chuichi* (tying prisoners of war to a post and beating them); *Trial of Arno Heering* (forced march with inadequate supplies); *Trial of Willi Mackensen* (forced march with inadequate supplies); *Gozawa Trial* (flogging, overwork, and general maltreatment).

[55] *See* note 52 *supra*. In Pictet, *Commentary* 627, the conclusion of the Commission of Experts was adopted and amplified as follows:

> *Inhuman treatment.*—The Convention provides, in Article 13, that prisoners of war must always be treated with humanity. The sort of treatment covered here would therefore be whatever is contrary to that general rule. It could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant prisoners of war in enemy hands a protection which will preserve their human dignity and prevent their being brought down to the level of animals. Certain measures, for example, which might cut prisoners of war off completely from the outside world and in particular from their families, or which would cause great injury to their human dignity, should be considered as inhuman treatment.

This same position had earlier been taken by the I.M.T.F.E., which referred to "mental torture," giving as an example an incident in which a number of actions were taken one evening to make certain prisoners of war (several of Doolittle's fliers) believe that they were about to be executed by a firing squad, but at the last minute they were told that the Japanese executed only at sunrise and that they would be executed in the morning if they did not talk before then. I.M.T.F.E. 1063. Article 11(1) of the 1977 Protocol I provides in part that "[t]he physical or mental health and integrity of persons who are in the power of the adverse Party . . . shall not be endangered by any unjustified act or omission." *See* note 66, *infra*. However, it is extremely doubtful that it would be possible to find provisions in most national penal codes which would cover this type of offense.

offense falls below the lowest acceptable level of humane treatment, it does not definitively solve the problem of exactly where that level should be placed.[56]

Finding a substantive national penal provision which would furnish the basis for charging an individual with the offense of inhuman treatment of a prisoner of war should present no great difficulty in the majority of cases of this category.[57] Many, if not most, of them will result in the death of the prisoner of war and thus will permit of prosecution for either murder or some lesser degree of homicide; others, not involving the death of the prisoner of war, will fall within the definitions of assault and battery, maiming, maltreatment of prisoners of war,[58] maltreatment of a person subject to one's orders,[59] etc.

b. TORTURE

Even with respect to the two categories of inhuman treatment specifically mentioned in the Convention—torture and biological experiments—questions of interpretation arise. Thus, the position has been taken that the term "torture," as used in the Convention, relates primarily to maltreatment resorted to as an illegal method of obtaining a confession or information.[60] While this has undoubtedly been the motivation for a large part of the torture of which prisoners of war have been the victims,[61] such an interpretation must not be permitted to remove from the scope of the coverage of this grave breach of the Convention torture inflicted as punishment,[62] out of sheer sadism, or, even more important in these days of the war for men's minds, to "convert" an adamant prisoner of war to the Detaining Power's

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[56] In a claim for pecuniary damages made to the United States–German Mixed Claims Commission established after World War I, the claiment, a former prisoner of war of the Germans, contended that the use of paper bandages in a German hospital to bandage his wounds constituted maltreatment. The claim was disallowed. 6 Hackworth *Digest* 278. Such an act, particularly where caused by force of circumstances beyond the control of the Detaining Power, would unquestionably be above the line of demarcation.

[57] A few States have enacted general penal laws specifically making punishable the commission of any act constituting one of the grave breaches enumerated in Article 130. *See* pp. 371–374 *infra*.

[58] U.S.S.R. Law of 25 December 1958, Article 32. *See* note 75 *infra*.

[59] Article 93, *Uniform Code*, 10 *U.S.C.* §893.

[60] Pictet, *Commentary* 627; Pilloud. Protection pénale 854. These two authors would put all maltreatment for any purposes other than torture to obtain information and biological experiments under the offense of "wilfully causing great suffering." Pictet, *Commentary* 628; Pilloud. Protection pénale 856. Physical and mental torture inflicted in order to obtain information is specifically proscribed by the fourth paragraph of Article 17 of the Convention. *See* pp. 106–109 *supra*.

[61] *I.M.T.F.E.* 1029; *Trial of Erich Killinger*.

[62] For an example of this, *see I.M.T.F.E.* 1132–33 & 1057–58.

political ideology.[63] In other words, torture is, and should always be considered, a grave breach of the Convention, whatever its motive, and even if motiveless.

c. BIOLOGICAL EXPERIMENTS

The extensive use of prisoners of war during World War II as "guinea pigs" for medical experimentation was without precedent in the history of war.[64] There was no opposition to the specific inclusion of this offense among the grave breaches of the Convention to be listed in Article 130. However, there was some difference of opinion as to phraseology. It will be seen that in Article 130 reference is made solely to "biological experiments," while in the first paragraph of Article 13 the prohibition is against "medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest." An effort was made by one of the Netherlands delegates to have both articles use the term "biological experiments."[65] While the statement of the Netherlands delegate that the two terms were meant to cover the same illegal acts was undoubtedly correct, the definition contained in Article 13 appears to be far more definite and far less likely to result in legalistic disputes on interpretation. It is unfortunate that the 1949 Diplomatic Conference neither accepted the suggestion of the Netherlands delegate nor took the reverse action [that of changing Article 130 to make it coincide with the first paragraph of Article 13], and that it allowed the two different terms to remain in the Convention. However, from the history of the negotiations, it appears possible to conclude that any violation of the portion of Article 13 quoted above will constitute the grave breach of performing "biological ex-

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[63] The following statement from U.K., *Treatment* 22, clearly demonstrates the use of torture, not as a method of interrogation, but to force a prisoner of war to abandon his loyalty to his own country and to adopt the political views of his captors:

> When all of these methods of inducement had failed . . . the Chinese [Communists in Korea] had recourse to physical coercion and torture, revolting to the humane mind and expressly forbidden by the Prisoners-of-War Convention. Before the middle of 1951 the Chinese adopted the simple attitude that if a prisoner would not co-operate he was punished. If the punishment resulted in his death it was because he was an obstinate "war criminal." Later the argument was changed, and physical punishment was said to be inflicted for special offences rather than a general refusal to see "the light." Torture and ill-treatment were carried out quite cold-bloodedly for the purpose of breaking a man's resistance.

See note 34 *supra*.

[64] For some post–World War II trials which included incidents involving involuntary and illegal medical experiments on prisoners of war (and civilians) *see* *I.M.T.* 474; *I.M.T.F.E.* 1065; *Trial of Rudolf Hoess; Medical Case; Milch Case.*

[65] 2A *Final Record* 381.

periments" in violation of Article 130.[66]

It is doubtful that the penal code of any country will have provisions directly covering the offense of involuntary "biological experiments" or "medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner [of war] concerned and carried out in his interest." Where a State has enacted general legislation making punishable all violations of the provisions of Article 130,[67] no problem exists. Where such a step has not been taken, it will usually still be possible to prosecute individuals charged with illegal actions of this nature under national penal laws defining assault and battery, maiming, unjustifiable homicide, etc.[68] Of course, statutes specifically making such actions a penal offense, or making the violation of any part of Article 130 an offense, are preferable.

It should be noted that Article 13 includes among its "serious breaches" not only the "medical and scientific experiments" already noted, but also "physical mutilation." This might be as a result of a biological experiment. However, in addition, during World War II the Germans ordered that all Soviet prisoners of war be branded.[69] Such a procedure, performed with the traditional hot branding iron, would certainly constitute a violation of the prohibition against physical mutilation. While tattooing would likewise constitute a permanent physical mutilation, it is doubtful that branding by the use of indelible ink stamped on the individual prisoner of war would fall within the

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[66] Pictet, *Commentary* 627–28. The 1956 GE Report states (at 5):

> The Commission discussed, but without reaching a decision, the question whether every biological experiment on a protected person should be considered as a brave breach, as some experts considered. The Commission agreed, nevertheless, that every biological, medical or scientific experiment carried out against a person's will, or dignity, or likely to cause serious physical or mental injury, was prohibited by the Conventions and should be repressed.

Article 11(2) of the 1973 Draft Additional Protocol contained an additional prohibition against "physical mutilations or medical or scientific experiments, including grafts and organ transplants, which are not justified by the medical, dental or hospital treatment of the persons concerned and are not in their interest." With considerable editing this became Article 11(2) of the 1977 Protocol I. However, the Diplomatic Conference found it appropriate to add further restrictions in new Article 11(3), (5), and (6), and to provide specifically in new Article 11(4) that a violation of Article 11(1) or (2) would be a grave breach of the Protocol.

Ten excellent principles for use in determining the legality of the performance of medical experiments on a prisoner of war are set forth in the opinion of the U.S. Military Tribunal in *The Medical Case*, 2 T.W.C. at 181–83. These principles are reproduced in Taylor, The Nuremburg War Crimes Trials, *International Conciliation*, April 1949, No. 450 at 284–86.

[67] *See* note 57, *supra*.

[68] Pilloud, Protection pénale 855–56.

[69] Trainin, *Hitlerite Responsibility* 51–53; Vizzard, Policy 250–51.

prohibition as it would cause no suffering and eventually fades away, leaving no actual mutilation.

It has been observed that the prohibitions against the use of prisoners of war as scientific guinea pigs do not include prohibitions against generally recognized and medically accepted inoculations and immunizations.[70] The prohibitions are solely against experimentation, not against practices that are recognized and applied by the medical profession generally. This would be equally true of valid surgical procedures deemed necessary for the health and well-being of the individual prisoner of war.

3. Wilfully Causing Great Suffering or Serious Injury to Body or Health

As long ago as during the War of 1812 between Great Britain and the United States the Parties thereto agreed that "[n]o Prisoner [of war] shall be struck with the hand, whip, stick, or any other weapon whatever."[71] While the wilful causing of great suffering by, or serious injury to, prisoners of war was clearly prohibited by both the 1907 Hague Regulations and the 1929 Convention, World War II saw the widespread commission of acts in violation of this prohibition.[72]

It is here that the ICRC would place sadistic maltreatment, rather than in the preceding category of offenses.[73] The inclusion of this particular grouping as a grave breach of the Convention should serve to prevent an offender from avoiding punishment as a result of an overly restrictive interpretation of the terms "inhuman treatment" and "torture." Actually, this category of grave breaches appears to be a sort of residual provision intended to cover most of the cases of physical or mental maltreatment that may be determined not to be within the previous category of grave breaches.

It has already been indicated that mental torture and moral suffering may fall within the ambit of "inhuman treatment" or "torture," proscribed under the grave breaches discussed immediately above.[74] They may also constitute a violation of the present category of grave

[70] *See* note II-124 *supra*. U.S. Army *Regs.* 633–60, paras. 37 & 41. Para. 37, specifically requires the military authorities of prisoner-of-war camps operated by the United States to give certain inoculations and vaccinations. Paragraph 41 of those Regulations provides for the maintenance of lists of the blood types of prisoners of war "who have volunteered to furnish blood," a procedure which would also not be within the purview of the prohibitions. *See also* Pictet, *Commentary* 141 and Article 11(3) and (6) of the 1977 Protocol I.

[71] Article VII, *Cartel for the Exchange of Prisoners of War between Great Britain and the United States* (1813). After World War I two leading English scholars stated that "except in self-defence or to prevent escape, it is contrary to the laws and customs of war, as hitherto understood, to strike a prisoner [of war] at all." Phillimore & Bellot 58.

[72] *I.M.T.* 474; *I.M.T.F.E.* 1088–89; *Pal Dissent* 1124 & 1158; Olson, Soviet Policy 53. *But see* Anon., *POW in Russia* 20.

[73] Pictet, *Commentary* 628; Pilloud, Protection pénale 856.

[74] *See* pp. 356–357 *supra*, and note 55 *supra*.

breaches. Reservations must be attached to any statement concerning the existence and availability in the law of many States of substantive penal statutes which could serve as a basis for prosecutions for offenses constituting this category of grave breaches.[75] Thus, it is extremely difficult to conceive of any existing statute in the United States criminal code which can be considered as proscribing the offense of causing great moral suffering in the absence of a direct physical act.[76]

4. Compelling a Prisoner of War to Serve in the Forces of the Hostile Power

The last paragraph of Article 23 of the 1907 Hague Regulations forbade a belligerent "to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war."[77] During World War I the Germans attempted, albeit unsuccessfully, to persuade British prisoners of war of Irish origin to volunteer for service in an Irish brigade to be formed as a part of the German army.[78] During World War II there were many instances, particularly on the part of the Germans, of the recruitment or the compelling of prisoners of war (and enemy civilians) to serve in the armed forces of the Detaining Power and to fight against their own

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[75] The Soviet Union has attempted to eliminate this as a legal problem by the enactment of a penal statute which provides that "[m]istreatment of prisoners of war, occurring repeatedly or in conjunction with special cruelty, . . . shall be punished by deprivation of freedom for a term of one to three years." Article 32, U.S.S.R. Law of 25 December 1958. The *Commentary* to that article states that "[t]he objective side of mistreatment of prisoners of war may be reflected in actions (for example, beatings) or failure to act (for example, deprivation of food)."

[76] An incident causing great mental suffering, such as that related by I.M.T.F.E. (see note 55 *supra*), might, under some penal codes, constitute the offense of communicating a threat. This would make punishable some of the acts proscribed by this category of grave breaches. But by no stretch of the imagination (and criminal courts, even when trying former enemies, are not noted for the fertility of their imaginations) can an offense presently be found to be included in the penal codes of the vast majority of nations which would permit a conviction for many other acts which would undoubtedly cause great mental suffering. There can be no dispute as to the validity of the statement that "it may be wondered if this is not a special offense not dealt with by national legislation." Pictet, *Commentary* 628.

[77] This provision was new, there having been no equivalent provision in the 1899 Hague Regulations. There was, of course, no sanction specified for violations.

[78] Of approximately 4,000 eligibles only 32 volunteered. Vizzard, Policy 239. For the details of this episode, see Inglis, *Roger Casement* 287–89. In *Rex v. Casement* he was convicted of treason by a British court. However, the German action did not violate the provision of the 1907 Hague Regulations quoted in the text as it was based strictly on volunteering.

country or its allies.[79] The prohibition contained in the 1907 Hague Regulations related only to compulsory service and included no sanctions for violations. The latter defect has now been remedied. However, as is readily seen, the only prohibition contained in Article 130 of the 1949 Convention is once again against compulsion, and no mention is made of attempts to recruit prisoners of war into the armed forces of the Detaining Power. Such action is prohibited by Article 7 of the Convention, which provides that prisoners of war may not "renounce in part or in entirety the rights secured to them by the present Convention."[80] Any holding to the contrary would, in effect, nullify the grave breaches provision under discussion, as a Detaining Power so inclined would certainly contend that the challenged enlistments were all voluntary, and would certainly have documentary and other evidence to establish the voluntariness of the recruitment of the prisoners of war into its armed forces.[81]

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[79] For one attempt to obtain volunteers from among the prisoners of war, see Maughan, *Tobruk* 806 (attempt by the Germans to recruit British and Australian prisoners of war to fight the Russians). For an example of compulsory military service, see the concuring opinion of Judge Musmanno in *The Milch Case*, 2 T.W.C. at 821–22 (use of Russian prisoners of war to man antiaircraft guns). The Germans had a number of military units composed of or including Russian prisoners of war (see Calvocoressi & Wint 469–70) and the Soviet Union had a number of military units composed of or including German prisoners of war, the great majority of whom had probably volunteered to serve against their own countries. *See, e.g.*, Bethell, *The Last Secret, passim;* Epstein, *Operation Keelhaul, passim.* (While this latter book appears to be factually correct, the reader must, at times, be careful not to be misled by its unwarranted assumptions and unwarranted conclusions.) *See also* note I-324 *supra.*

[80] The 1949 Convention contains no specific provision other than that of Article 130 with respect to a prisoner of war's serving in the armed forces of the Detaining Power. In the 1949 Civilian Convention, the first paragraph of Article 51 affirmatively provides that "[t]he Occupying Power may not compel protected persons to serve in its armed or auxiliary forces," while Article 147 thereof parallels Article 130 of the Prisoner-of-War Convention. Moreover, that paragraph of Article 51 of the Civilians Convention contains another provision not found in the Prisoner-of-War Convention prohibiting "pressure or propaganda which aims at securing voluntary enlistment." The Netherlands Government proposed that the Prisoner-of-War Convention include a similar provision (Diplomatic Conference Documents, Proposition by the Netherlands Government, Document No. 8 at 6; 2A *Final Record* 248), but nothing appears to have come of this proposal. One writer suggests that the acceptance of voluntary enlistments is a "minor" breach of the Convention. Clause, Status 23–24. (A better term for violations of the Convention which are not among the specifically enumerated grave or serious breaches would probably be "other breaches.")

[81] During the course of the hostilities in Korea the Communists announced at various times the capture of a total of from 50,000 to 75,000 prisoners of war. When the discussions of the prisoner-of-war problem began at the armistice negotiations, they claimed that they were holding a very small fraction of even the lower figure. Challenged as to the fate of the balance, the great majority of whom had been members of the Republic of Korea army, one of the assertions made by

One problem that was the subject of lengthy discussion at the 1956 Conference of the Commission of Experts, and which was not resolved by them, is the question of the definition of the term "forces" used in this grave-breaches clause.[82] Does it include the labor service organizations, the factory guard units, the antiaircraft artillery units, the special police units, and the various other auxiliary units which flourished during World War II, or is it limited to the regular armed forces of the Detaining Power? One member of the Commission of Experts felt that the word "auxiliary" was intentionally omitted from the grave-breaches Article of the Convention so that compelling service in the hostile force would not be a grave breach unless the prisoner of war was compelled to take part in combat against his own country;[83] other members of the Commission felt that the question should be left for determination by the judges trying cases which raise the problem;[84] while still others were of the opinion that the categories of organizations mentioned in Article 1 of the 1907 Hague Regulations and in Article 4 of the 1949 Convention should govern.[85] It appears that this question will, of necessity, have to be decided by the tribunals which may be called upon to sit on cases of alleged violations of this clause of Article 130 of the Convention.[86]

5. Wilfully Depriving a Prisoner of War of the Rights of Fair and Regular Trial Prescribed in This Convention

After World War II a number of individuals were charged with, and tried for, having ordered or participated in trials of prisoners of war

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the Communists was that many of the missing prisoners of war had been "reeducated" and had then "volunteered" to serve in the North Korean army. Acheson, The Prisoner Question 744. It does not require much imagination to visualize the nature of the "reeducation" or the actual extent of the "volunteering." Absorption of prisoners of war into one's own army is an old Asiatic custom. *See* Sun Tsu's *Art of War* and the *Manu Sriti*, pp. 3–4 *supra*.

[82] The English version of the Convention uses the term "forces of the *hostile* Power" while the French version uses the term "forces *armées* de la Puissance *ennemie*." (Emphasis added.) It is clear that this discrepancy was the result of poor coordination and that the two provisions were intended to be identical.

[83] 1956 GE Report, 7th Meeting at 6. The word "auxiliary" is included in the first paragraph of Article 51 of the Civilians Convention (*see* note 80 *supra*), but not in Article 147 thereof, the grave-breaches Article of that Convention.

[84] 1956 GE Report 6. This is a policy of avoiding the need for reaching a decision which has been adopted all too frequently in this area of international law.

[85] *Ibid.*

[86] In Pilloud, Protection pénale 858, the statement is made that "this violation appears difficult to assimilate to a common law crime." (Transl. mine.) Certainly, no existing statute of the United States has been found that could be used as a vehicle for the trial and punishment of persons alleged to be guilty of this grave breach of the Convention.

which had made a mockery of justice.[87] In each of these "trials" the prisoner of war had been charged with a precapture offense. In *Matter of Yamashita* the United States Supreme Court held that prisoners of war charged with precapture offenses were not entitled to all of the protections afforded by the 1929 Convention, but said that neverthless "it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording them opportunity to make a defense."[88]

The draftsmen of the 1949 Convention included this offense among the grave breaches of the Convention—and rightly so. The "rights of fair and regular trial prescribed in this Convention" to which a prisoner of war is entitled are undoubtedly included among those substantive and procedural rights enumerated in Articles 84–88 and 99–108, inclusive, of the Convention, but it must be conceded that not all of these rights are necessarily vital to a "fair and regular trial."[89] During the 1949 Diplomatic Conference at which Article 130 was conceived, drafted, and adopted, there was some discussion as to the advisability of listing therein the specific judicial rights the denial of which would constitute a grave breach, but this proposal was rejected.[90] Hence, once again, much has been left for interpretation by each

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[87] *I.M.T.F.E.* 1027; *Trial of Shigeru Sawada; Trial of Harukei Isayama, Trial of Tanaka Hisakasu.* In its recital of the evidence in the Shigeru Sawada case, the UNWCC said (5 *LRTWC* at 2–3):

> The fliers were not told that they were being tried; they were not advised of any charges against them; they were not given any opportunity to plead, either guilty or not guilty; they were not asked (nor did they say anything) about their bombing mission. No witness appeared at the proceedings; the fliers themselves did not see any of the statements utilized by the court that they had previously made at Tokyo; they were not represented by counsel; no reporter was present; and to their knowledge no evidence was presented against them.

In the Tanaka Hisakasu case, the UNWCC summarized the offense for which the Japanese accused were tried as follows (5 *LTRTWC* at 73):

> The accused were in fact found guilty of the denial of certain basic safeguards which are recognized by all civilized nations as being elements essential to a fair trial, and of the killing or imprisonment of captives without having accorded them such a trial.

[88] 327 U.S. 1 at 24, note 10.

[89] 2B *Final Record* 117. Under Article 85 the prisoner of war tried for a precapture offense is entitled "to the benefits of the present Convention"—which means *all* of the benefits of the Convention. *See* pp. 379–382 *infra*. The grave breach specified in Article 130 is for depriving the prisoner of war of "the rights of *fair and regular trial prescribed in this Convention.*" (Emphasis added.) Violation of parts or all of a number of the articles cited in the text would not necessarily derogate from a fair and regular trial. *See* 6 *LRTWC* 103. While such violations would not, therefore, constitute grave breaches of the Convention, they would still be "acts contrary to the provisions of the present Convention" (Article 129, third paragraph) and would thus fall within the category of "other breaches." *See* note 80 *supra*. *See* also Article 75(4) and (7) of the 1977 Protocol I.

[90] 2B *Final Record* 88.

national tribunal which is called upon to render judgment after trial of an individual charged with the commission of this grave breach of the Convention.[91]

6. Protection against:

a. ACTS OF VIOLENCE OR INTIMIDATION

This is one of the prohibitions of the second paragraph of Article 13 which is not specifically included in Article 130.[92] As the paragraph begins with the word "Likewise," it appears that the intention was to bring it within the category of "serious breaches."[93] Most acts of violence or intimidation against prisoners of war will probably be chargeable as wilful killing, inhuman treatment, torture, or wilfully causing a great suffering or serious injury to body or health. Moreover. this is one of the areas in which personnel of the Detaining Power may be found to have committed a violation of the Convention by an act of omission. During World War II there were numerous instances of civilians being permitted to commit acts of violence, including murder, upon prisoners of war, without any attempt being made to protect them by those in whose custody they were.[94] After the war many of these latter were tried for this offense.[95]

b. INSULTS AND PUBLIC CURIOSITY

In his 1863 Code, Lieber included a provision which prohibited subjecting prisoners of war to any "indignity."[96] However, this type of protection did not attain international status until it was included in the second paragraph of Article 2 of the 1929 Convention, which required that prisoners of war be protected from "insults and public

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[91] Article 37 of the *Uniform Code* (10 *U.S.C.* §837), prohibits any commanding officer from coercing or influencing the actions of any military tribunal convened under the Code, or any member thereof; and Article 98 of that Code (10 *U.S.C.* §898) provides for the punishment of violations of the procedural provisions thereof. However, these provisions apply only to United States courts-martial, and not to improper trials by enemy tribunals. Of course, if the accused were a prisoner of war in the hands of the United States as the Detaining Power, he would be subject to the jurisdiction of United States courts-martial for the precapture offense of wilfully depriving prisoners of war of their right to a fair and regular trial. *See* Article 2(9), *Uniform Code*, 10 *U.S.C.* §802(9).

[92] It derives from Article 2(2) of the 1907 Hague Regulations.

[93] *See* p. 352 *supra*, and notes 42 and 44 *supra*.

[94] In *I.M.T.* (22 TMWC at 472), the following statement appears: "When Allied airmen were forced to land in Germany, they were sometimes killed at once by the civilian population. The Police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them." For documentary evidence of the foregoing, see *The Justice Case*, 3 T.W.C. 1095–99.

[95] *See, e.g., Essen Lynching Case; Trial of Albert Bury; Trial of August Schmidt.*

[96] Article 75 of the *Lieber Code* stated that prisoners of war could be confined "but they are to be subjected to no other intentional suffering or indignity."

curiosity."[97] During World War II events of this nature occurred both in Europe[98] and in the Far East,[99] and resulted in postwar trials of individuals for violations of this provision.

The second paragraph of Article 13 differs very little from its predecessor, except insofar as it may be construed to be specifically included among the "serious breaches" of the 1949 Convention. Unfortunately, it can be anticipated that it will be violated on occasion in any future international armed conflict as it has been in the past.[100] The propensity for using prisoners of war for propaganda purposes, demonstrated on two continents during World War II, has since been exhibited again in North Vietnam[101] and in China.[102]

c. REPRISALS

Reprisals in the law of war are acts, otherwise illegal, committed by one side in an armed conflict in order to put pressure on the other side to compel it to abandon a course of action that it is following which is in violation of the law of war.[103] Lieber stated specifically

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[97] In 1943 the Judge Advocate General of the United States Army interpreted this provision in the following manner: "The 'public curiosity' against which Article 2 of the Convention protects them is the curious and perhaps scornful gaze of the crowd." SPJGW 1943/11228. This opinion found no objection to the publication of pictures of prisoners of war as long as they were not of such a nature as to defame, to invade their right of privacy, or to expose them to public ridicule, hatred, or contempt. This is probably a dangerous and difficult line to draw.

[98] *Trial of Kurt Maelzer* (parading American prisoners of war through the streets of Rome). In *The High Command Case* the Military Tribunal held that the rights of prisoners of war to protection against violence, insults, and public curiosity were "an expression of the accepted views of civilized nations." 11 T.W.C. 535. *See also I.M.T.*, 22 TMWC at 497. In Draper, *Recueil* 90, the opposite conclusion is reached.

[99] *I.M.T.F.E.* 1030–31 & 1092–94 (parading prisoners of war through the streets of cities in China, Korea, and Burma). *But see Pal Dissent* 1167–68.

[100] Humiliation and degradation is still a part of the culture of some countries. *See, e.g.*, Miller, *The Law of War* 260. Nevertheless, the Standard Minimum Rules contain, in Article 45(1), a requirement that when civilian prisoners are being moved to or from a penal institution "proper safeguards shall be adopted to protect them from insult, curiosity and publicity in any form."

[101] *New York Times*, 8 July 1966 at 3, col. 1; *ibid.*, 13 July 1966 at 1, col. 7; *ibid.*, 9 May 1967 at 15, col. 1; 56 *Dept. State Bull.* 825 (1967); Haight, Shadow War 47; Naughton, Motivational Factors 11; ICRC, The International Committee and the Vietnam Conflict, 6 *I.R.R.C.* 399 & 404; Levie, Maltreatment in Vietnam 342–44.

[102] Cohen & Chiu, *People's China* 1573–74 (Indian prisoners of war); *ibid.*, 1575–76 (Americans shot down over China).

[103] *British Manual*, para. 642; *U.S. Manual*, para. 497a; Pictet, *Commentary on the First Convention* 341–42. Reprisals must be distinguished from retorsion. In the latter the retaliatory act is a legal action which the party has a right to take but had not previously taken. ICRC *Report* 367. The requirements for a valid reprisal, where a reprisal is permitted by international law, are to be found in Draper, Implementation 49; 1972 *Basic Tests*, Article 74, para. 2; and Levie, Mal-

that "prisoners of war are liable to the infliction of retaliatory measures."[104] The 1899 and 1907 Hague Regulations did not touch upon the subject of reprisals against prisoners of war, and during World War I such reprisals occurred on both sides.[105] Ultimately, many of the bilateral agreements with respect to prisoners of war entered into during the course of that armed conflict included specific provisions concerning reprisals against them, but only to impose a requirement for a specified period of delay between announcement and enforcement.[106]

The failure of the 1907 Hague Regulations to outlaw reprisals was one of the major criticisms leveled at those Regulations,[107] and was one of the major concerns of the Diplomatic Conference which drafted the 1929 Convention.[108] The ICRC had long since proposed that reprisals against prisoners of war be specifically prohibited.[109] This was the proposal that was made to the 1929 Diplomatic Conference;[110] a British counterproposal would have condemned such reprisals but would have allowed them to be imposed where the enemy government had committed or sanctioned illegal acts with respect to prisoners of war detained by it.[111] The ICRC proposal for the categorical prohibition was adopted as the last sentence of Article 2 of the 1929 Conven-

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treatment in Vietnam 354. (The latter did not mention proportionality inasmuch as there was no question of proportionality in the case there discussed.)

[104] *Lieber Code*, Article 59(2). There is, of course, the possibility that the term "retaliatory measures" used by Lieber referred solely to retorsion and not to reprisals. In 1863, when the Federal government began to organize Negro regiments, the Confederate government announced that captured Negro soldiers would not be treated as prisoners of war. President Lincoln thereupon issed a proclamation providing that for every Union soldier killed in violation of the law of war one "rebel soldier" would be executed (reprisal) and that for every Union soldier sold into slavery "a rebel soldier shall be placed at hard labor on the public works" (retorsion). Winthrop, *Military Law* 1242; *PMG Review*, III at 28.

[105] Dufour, *Dans les camps de représailles;* Vizzard, Policy 241; Bower, The Laws of War; Prisoners of War and Reprisals, 1 *Trans.* 15, 19–25; Gray *The Killing Time* 149. *The German War Book*, issued prior to World War I, although widely condemned for its general disregard of the customary and conventional law of war, did limit reprisals against prisoners of war to cases of "extreme necessity," "self-preservation," and the security of the state. Morgan, *The German War Book* 74.

[106] *See, e.g., Agreement between Great Britain and Germany* (July 1917), para. 20; *Agreement between the British and Turkish Governments* (December 1917), Article XXI; and *Agreement between France and Germany* (May 1918), para. 42.

[107] Phillimore & Bellot 59.

[108] For an overall review of the background and events of that Conference with respect to reprisals against prisoners of war, see Kalshoven, *Belligerent Reprisals* 69–82.

[109] *Ibid.*, 71.

[110] *Ibid.*, 78.

[111] *Ibid.*, 79. This was substantially the procedure contained in Article 13 of the ILA's Proposed International Regulations, note I-40 *supra*.

tion.[112] So important was this provision considered, that in reporting it to the Plenary Meeting the statement was made that even had the Conference accomplished nothing else, it would have to be considered a success![113]

Despite this unambiguous provision of the 1929 Convention, reprisals and threats of reprisals against prisoners of war were resorted to during World War II.[114] Most of these actions fell within the category of reprisals for alleged prior illegal treatment of prisoners of war by the enemy;[115] however, some were completely unrelated to the treatment accorded to prisoners of war by the other side.[116] Once again, the use of reprisals against prisoners of war merely revealed that each act of reprisal usually resulted in a retaliatory act by the enemy; that reprisals against prisoners of war were ineffective in accomplishing their intended purpose; that such reprisals merely made the innocent suffer for acts for which they had not been responsible and over which they had had no control; and that the draftsmen of the 1929 Convention had acted correctly in categorically banning the practice.[117]

Apart from an unimportant editorial change, the last sentence of Article 13 of the 1949 Convention exactly reproduces the cognate pro-

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[112] Flory, *Prisoners of War* 45 states that "it seems reasonable to assume that reprisals, with prisoners of war as the objects, are permissible within limits in customary international law." It is important to bear in mind that Flory was setting forth his view of the *customary* rule in 1942, apart from the provision of the 1929 Convention.

[113] Kalshoven, *Belligerent Reprisals* 80. Another author found the inclusion in the 1929 Convention of the provision prohibiting reprisals against prisoners of war "surprising" in the light of the World War I experiences. Meitani, Regime 301.

[114] See generally, Anon., Les représailles contre les prisonniers de guerre, 29 *R.I.C.R.* 863.

[115] Maughan, *Tobruk* 774, 791, & 808; 1 ICRC *Report*, 371. The most famous case in this respect was, of course, the series of successive reprisals resulting from the Canadian shackling of German prisoners of war during the raids on Dieppe and Sark. 1 Stacey, *Six Years of War: the Army in Canada, Britain and the Pacific* at 396–97; 1 ICRC *Report*, 368–70; Kalshoven, *Belligerent Reprisals* 178–83; *British Manual*, para. 137 n.2(a) & (b). (Whether the original shackling was a violation of the law of was is not completely clear. *See. e.g.*, Vattel, Vol. II, Bk. III, Ch. VIII, sec. 150; and Kalshoven, *Belligerent Reprisals* 180. At the 1947 Conference of Government Experts the United Kingdom representative (Satow) proposed the specific prohibition of shackling. No action was taken on his proposal. 1947 GE Report 118.)

[116] For example, one threat of reprisal against prisoners of war was based upon the alleged bombing of a dressing station in North Africa. 1 ICRC *Report*, 370. There were rumors, never fully substantiated, that the Japanese had threatened to execute 10 American officers for each day that American forces in the Philippines continued to fight after General Wainwright's surrender on Corregidor. This would have violated not only the last sentence of Article 2 of the 1929 Convention, but the general law of war as well.

[117] *See generally*, Pictet, *Commentary* 141–42; and 1971 GE Documentation, II, at 49.

vision of the 1929 Convention. It therefore continues to be absolute in character, and may not be disregarded even in an attempt to bring about a cessation of violations of the Convention by the enemy.[118] A right of reprisal against prisoners of war was not claimed by the North Koreans or Chinese Communists as the reason for their maltreatment of United Nations Command prisoners of war during the hostilities in Korea.[119] It was asserted by the Vietcong that their executions of a number of American prisoners of war held by them was in retaliation for the execution of convicted Vietcong terrorists by the South Vietnamese.[120] This constituted but another post–1949 Convention violation of the provisions of that Convention and of customary international law.

A strict construction of Article 13 will result in a determination that the prohibition against reprisals contained in that Article is not one of the offenses therein designated as "serious breaches" of the Convention. While many acts of reprisal against prisoners of war will undoubtedly fall within the categories of offenses listed as grave breaches in Article 130 or as serious breaches in the first two paragraphs of Article 13, there are many which will not. Nevertheless, they will constitute violations of the Convention and will constitute "other breaches" which the Parties are required to suppress under the provisions of the third paragraph of Article 129.

7. Other Offenses

Various other prohibitions in the treatment of prisoners of war, some of which concern extremely serious actions, others of which are of less seriousness, appear throughout the Convention.[121] As we shall see, the Convention contemplates that punishment will be adjudged

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[118] Draper, Implementation 50; Kalshoven, *Belligerent Reprisals* 213 & 303; *British Manual*, para. 133(b); and *Committee Report*, 50 *I.L.A. Rep.* 202. Although Lauterpacht-Oppenheim 562 n.3, seems to be to the same effect, one author interprets it as taking the position that "the arguments are evenly balanced" and concludes that the use of reprisals against prisoners of war is only prohibited "for breaches of the Convention." Stone, *Legal Controls* 656 & n.21 thereon. This position does not appear to have other support.

[119] It has been suggested that in the light of the many acts of retaliation taken by the PRC in recent years for alleged violations of international law, it might well be expected to extend this practice to prisoners of war. Miller, *The Law of War* 237.

[120] Levie, Maltreatment in Vietnam 353–58. Although Kalshoven disagreed with both the facts and the law stated in that article (Kalshoven, *Belligerent Reprisals* 295–305), he concluded, as did this author, that "the executions of American prisoners of war carried out by the Vietcong were clear violations of [the last sentence of Article 13]." *Ibid.*, 303.

[121] *See, e.g.*, Article 16 (adverse distinction based on race, nationality, religious belief, or political opinions); Article 19 (unnecessary exposure to danger); Article 22 (interning in a penitentiary); Article 23 (use to render areas immune from military operations); Articles 50 and 51 (compelling prisoners of war to perform unauthorized or prohibited work); Article 87 (collective punishment); etc.

for these types of violations of its provisions, as well as for those which are specifically designated "grave breaches," or "serious breaches."[122]

C. PROCEDURAL PROVISIONS

The "code of criminal procedure" for persons tried for maltreatment of prisoners of war is contained, in capsulated form, in Article 129 of the Convention.[123] This Article had a somewhat chaotic conception and birth and requires some preliminary historical discussion in order that it may be properly understood.

The original proposal of the ICRC was concerned only with the need for national legislation to contain substantive provisions making violations of the Convention punishable, and a requirement that the Parties search for violators of the provisions of the Convention and try or extradite them.[124] Although this provision was approved by the 1948 Stockholm Conference with only a few minor changes,[125] that Conference was apparently not entirely satisfied with the results attained, as it also requested the ICRC to continue work on this subject.[126] The ICRC responded by drafting a second proposal which contained comprehensive provisions covering numerous facets of the problem, both substantive and procedural.[127] The article ultimately adopted (now Article 129 of the Convention) included few of the new procedural provisions proposed by the ICRC.[128] By analysis and analogy we must endeavor to arrive at a conclusion as to just how successful the procedure actually adopted has been and may be expected to be in the future.

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[122] *See* pp. 374–375 *infra*.

[123] Actually, this "code" contemplates the application of national substantive and procedural statutes with the proviso that the procedures followed must guarantee certain minimal judicial standards.

[124] Article 119, *Draft Revised Conventions* 134.

[125] When the version approved at Stockholm was printed (*Revised Draft Conventions* 99–100), it erroneously contained a number of unapproved material changes. It was reprinted with those changes in the official documentation for the 1949 Diplomatic Conference (1 *Final Record* 100), but a corrected version was likewise published there (*ibid.*, 101–02 and 3 *Final Record*, Annex 50 at 43).

[126] *See* note 26 *supra*.

[127] *See* note 27 *supra*.

[128] The procedural provisions contained in Article 129 of the Convention are substantially those of "Article A" of Annex 49, 3 *Final Record* 42, plus those of Article 119(c)(2) (trial safeguards) contained in the second ICRC proposal (see note 27 *supra;* Annex 52, 3 *Final Record* 44; and 2B *Final Record* 32 & 133). Of course, the provisions concerning national legislation and extradition had originated in the first ICRC proposal (note 124 *supra*) and were also contained in the second ICRC proposal (note 27 *supra*).

1. Undertaking to Enact Any Necessary Legislation

Under the first paragraph of Article 129 each Party to the Convention undertakes "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article." It was apparent and acknowledged that few national penal codes would have substantive provisions covering all of the grave breaches described in Article 130.[129] For this reason the ICRC had early proposed a provision committing States Parties to the Convention to have on their statute books legislation which would "prohibit all acts contrary to the stipulations" of the Convention.[130] Redrafted, this ultimately became the provision of Article 129 quoted above.

States were slow to react to the obligation thus assumed by them to secure from their legislatures the enactment of the necessary legislation.[131] In 1960 the ICRC could name only 3 States which had complied with the requirement laid down in the first paragraph of Article 129.[132] In 1965 and in 1969 the ICRC requested information in this regard from the National Red Cross Societies and received reports from 49, many of which were, unfortunately, worthless.[133] In 1971 the ICRC was still reporting that the usual national penal legislation was inadequate to ensure the repression of the grave breaches of the Convention.[134] A brief survey will indicate that while some States have fully complied with the requirement to enact legislation providing penal sanctions for violations of Article 130 of the Convention, others have only partially complied, and still others have taken no action whatsoever.

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[129] As far back as 1934 it had been determined that national penal codes lacked provisions for punishing violations of the 1907 Hague Convention and the 1929 Geneva Convention. 2B *Final Record* 85.

[130] Article 119(1), *Draft Revised Conventions* 134.

[131] Article 29, second paragraph, of the 1929 *Geneva Red Cross Convention* had contained a specific requirement that Governments report the actions taken in this regard to the Swiss Federal Council, the depositary of that convention, within five years of ratification. A similar two-year reporting provision was included in the second ICRC proposal (Article 119(2), Remarks and Proposals 64). It was not adopted. However, Article 128 of the Convention does require every Party to furnish to the other Parties "the laws and regulations which they may adopt to ensure the application" of the Convention. *See* p. 287 *supra*. Presumably this would include the laws and regulations implementing Articles 129 and 130. *See* Pictet, *Commentary* 616–17.

[132] Pictet, *Commentary* 621 n.1 (Switzerland, Yugoslavia, and The Netherlands).

[133] Measures to Repress (1965 and 1969). Article 73 of the 1973 Draft Additional Protocol contained a proposed provision on reporting comparable to that of Article 128 of the Convention. It became Article 84 of the 1977 Protocol I.

[134] 1971 GE Documentation, II, at 40, 47.

In 1951 Yugoslavia incorporated into its penal code an Article 127 entitled "War crimes against prisoners of war." This Article is really a national reenactment of the wording of the grave-breaches provision.[135] It provides for punishment upon conviction ranging from death to not less than 5 years' imprisonment. The United Kingdom has accomplished the same result, but by a slightly different path. Article 1(1) of its Geneva Conventions Act (1957) provides that any violation of Article 130 of the Convention shall be a felony. It then provides that the punishment upon conviction for wilful killing shall be life imprisonment; and for any of the other grave breaches it shall be imprisonment for not more than 14 years.[136]

Although the Soviet Union is often heard to claim leadership in the enactment of legislation to repress violations of the law of war, including that part thereof dealing with the protection of prisoners of war, analysis discloses that this is not the case.[137] In 1958 the Soviet Union enacted its Law on Criminal Responsibility for Military Crimes.[138] Article 32 of that law is the only one in any way related to the protection of prisoners of war. It provides that "[m]istreatment of prisoners of war, occurring repeatedly or in conjunction with special cruelty" is punishable by deprivation of freedom for a period of one to three years.[139] This is scarcely a very comprehensive coverage of the grave breaches of Article 130—nor does the punishment appear to be really adequate.[140] Presumably, the wilful killing of a

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[135] The statute reproduced in 1965 Measure to Repress 185, 186, is a translation from Serbo-Croatian into French. While it differs somewhat from the official French version of Article 130, this is probably only because of the double translation (French–Serbo-Croatian–French) and not from any intention to make changes.

[136] Another procedure which is probably intended to accomplish the same result is that adopted by Venezuela. Article 474(7) of that country's *Código de Justicia Militar* (1958, ed. of 1969) provides for a punishment of confinement for from 4 to 10 years for those who violate treaties. The Netherlands *Loi concernant le droit pénal militaire* has, in part, adopted a comparable approach by providing, in Article 8, for the punishment by confinement for a maximum of 10 years for those found guilty of a "violation of the laws and customs of war," with more severe punishment for aggravated offenses. 1956 Measures to Repress 115 & 117–18. The difficulty with this approach is that it will result in many of the same problems which arose in the "war crimes" trials after World War II.

[137] Ramundo, Soviet Criminal Legislation 83–84.

[138] The U.S.S.R. Law of 25 December 1958 is merely a reenactment of a statutory provision which originated in Russian law during the Tsarist era. *Ibid.*

[139] *Ibid.*, 74 n.7. Paragraph (b) of that article makes such an offense, committed without aggravating circumstances, subject only to disciplinary punishment.

[140] On the other hand, Article 29(b) of the same statute makes violence to or cruel treatment of fellow (Russian) prisoners of war, committed by one in the position of a superior, punishable by confinement for from 3 to 10 years. *Ibid.* Even the ICRC has been sufficiently pragmatic to suggest confinement for from 5 to 10 years for "other breaches" of the Convention, those presumably less serious than the grave breaches. *See* note 149 *infra*.

prisoner of war could be appropriately punished under the applicable provision of the general penal code; but a number of the other grave breaches will not be covered by such a code.[141]

The third category of States mentioned above, those who have taken no action whatsoever to comply with the commitment contained in the first paragraph of Article 129, is well represented by the United States. During the hearing conducted by the Committee on Foreign Relations of the United States Senate prior to the latter's giving its advice and consent to the ratification of the four 1949 Geneva Conventions for the Protection of War Victims, testimony was given to the effect that "it would be difficult to find any of these acts [grave breaches] which, if committed in the United States, are not already violations of the domestic law of the United States."[142] Subsequently, the Department of Justice wrote a letter to the Chairman of the Committee in which, among other matters, the statement was made that "[a] review of existing legislation reveals no need to enact further legislation in order to provide effective penal sanctions for those violations of the Geneva conventions which are designated as grave breaches."[143] Unfortunately, the foregoing statements are not correct. There are a number of grave breaches as to which it can definitely be said that no proper national penal legislation presently exists for the punishment of individuals who commit them. And even if it should appear that there is an existing national law which may possibly be adequate for the punishment of a particular grave breach, this does not justify inaction and reliance on a controversial interpretation of that law. Should the courts later decide that the law in question has not been properly interpreted and that it does not, as claimed, cover a particular grave breach, this would probably make it impossible to prosecute any grave breach of that particular category which had been committed prior to the enactment of subsequent (*ex post facto*) remedial legislation. It scarcely seems proper to disregard a treaty commitment and to risk an inability to prosecute one

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[141] For example, under the Soviet statute it would not be possible to prosecute for the grave breach of compelling a prisoner of war to serve in the armed forces of the Detaining Power or of wilfully depriving a prisoner of war of the rights of fair and regular trial, and it is extremely doubtful that these offenses would fall within the ambit of any provision of the general penal code.

[142] 1955 Hearing 24. *See also, ibid.*, 29. Note that in any event the quoted assertion was limited to "acts committed in the United States." Suppose that a member of the armed forces of the United States is alleged to have committed a grave breach of the Convention after which he returns to the United States and is discharged from the military service. No court of the United States would have jurisdiction. *Toth v. Quarles.*

[143] 1955 Hearing 58. It will be seen that mention is made only of grave breaches of the Convention. (The letter did admit that there was a need for legislation to provide penalties for the improper use of "PW" and "PG" markings! *Ibid.*, 59. *See* the last paragraph of Article 23 of the Convention and p. 123 *supra*).

or more of these grave breaches of the Convention solely in order to avoid bringing the need for additional penal legislation to the attention of the Congress. (Of course, the United States might, as was done after World War II, merely allege a "violation of the law of war" and then, in a specification, set forth the facts constituting the grave breach. But it is this procedure, with the criticism which it provoked, that Articles 129 and 130 were intended to remedy; and the legality of this procedure is now highly questionable.)

Consideration has also been given to the possibility that Article 130 itself created the offenses which it denounced. The report of the Senate Committee indicates that it arrived at the contrary conclusion, the specific statement being made that "the grave breaches provisions cannot be regarded as self-executing and do not create international criminal law."[144]

The United States would be well advised to follow the example of countries such as the United Kingdom and Yugoslavia and enact all-encompassing legislation which would ensure that the United States could try individuals who commit the grave breaches of the Convention enumerated in Article 130 of the Convention.[145]

2. Undertaking to Suppress Other Violations

Under the provisions of the third paragraph of Article 129 the Parties have accepted the general obligation to take all measures necessary for the suppression of the violations of the Convention other than the grave breaches of Article 130. This, of course, includes a requirement to enact penal legislation under which persons who are alleged to have committed such "other breaches" of the Convention may be tried and, if found guilty, punished. A reading of Chapter II hereof alone will indicate that the Convention is, and necessarily so, replete with prohibitions placed upon the Detaining Power and its pensonnel in the treatment of prisoners of war.[146] Although many of these acts were punished after World War II as violations of the laws and customs of war, few of them will fall within the prohibitions of specific penal legislation of most States. The problem here is identical with that discussed immediately above with reference to grave breaches—except that it is more far-reaching as it includes a

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[144] 1955 Senate Report 27. To the same effect, see Toomepu, Trial of American Civilians as War Criminals in American Courts, 31 *Fed. Bar J.* 73. While this is really the effect of the Venezuelan approach (note 136 *supra*), the provisions of the Convention have there been legislatively incorporated into the Venezuelan military criminal code. (For another possible solution, see Esgain & Solf 583–88.)

[145] As we shall see, the default is not limited to the failure to enact laws punishing grave breaches.

[146] For a very few examples of these prohibitions, *see* note 121 *supra*. There are also a great many affirmative mandates the failure to comply with which would be violations of the Convention. *See, e.g.*, Article 25 (quarters); Article 26 (food); Article 27 (clothing); Article 29, 30, and 31 (medical care); etc.

considerably greater number of potential offenses, a very large majority of which have little or no resemblance whatsoever to any present statutory offense.[147] Once again, the need for legislation is indicated, both in order to fulfill the treaty obligation assumed by each of the Parties to the Convention and in order to enable them properly to punish those who have violated any of the provisions of the Convention, even though such violations may not, in many cases, be considered to be on the level of importance of the grave breaches. And, once again, we find that the Parties to the Convention have, by and large, completely disregarded their obligation under the third paragraph of Article 129. Indeed, some, such as the United Kingdom, have enacted the legislation concerning grave breaches called for by the first paragraph of Article 129, but have made no effort whatsoever to enact the legislation concerning other breaches called for by the third paragraph of Article 129.[148] Nothing less than a concerted effort by all concerned will remedy this situation.[149]

3. Undertaking to Search for and to Extradite or Try Accused Persons

After World War II a number of former high Nazi officials and officers, many guilty of the most heinous of crimes, including those against prisoners of war, took refuge in various friendly countries and lived there under assumed names.[150] The countries of asylum have almost uniformly denied extradition when it has been requested,[151] and many of the individuals concerned have avoided any punishment for their crimes. Efforts to prevent a recurrence of this situation by denying such persons places of refuge resulted in the second paragraph of Article 129 of the Convention. Under its provisions each

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[147] It would be difficult, indeed, to identify an offense in the vast majority of national penal codes under which an individual could be charged, for example, with wilfully delaying the evacuation of prisoners of war from the combat zone in order to render the area immune from attack, in violation of the first paragraph of Article 23; or for compelling a prisoner of war to work in a chemical factory, in violation of Article 50(b); or for refusing to permit prisoners of war to send or receive mail, in violation of Article 71; etc. Here, again, the Venezuelan and Netherlands approach (note 136, *supra*) may be considered as a solution to the problem by providing the necessary legal basis for the prosecution of offenses of this nature.

[148] *See* note 46 *supra*.

[149] In Pictet, *Commentary* 629, the excellent suggestion is made that if a statute with separate provisions for each violation of the Convention is not deemed feasible, the minimum requirement would be for a statute with separate provisions as to each grave breach and a general provision providing for a reasonable punishment (imprisonment for 5 to 10 years) for all other violations.

[150] For what purports to be the true story of some of the better known members of this group, including Bormann and Eichmann, see Farago, *Aftermath*.

[151] 1971 GE Report, para. 569. For a famous (or infamous) case of this nature, see *United States v. Artukovic*.

Party to the Convention, *whether or not a belligerent*,[152] places itself under an obligation (a) to search out persons alleged to have committed, or to have ordered to be committed, any grave breach; (b) to bring such persons, regardless of nationality, to trial before its own courts; and (c) if it prefers, and subject to its laws, to turn such persons over to another Party for trial, where such other Party has made out a *prima facie* case against them.[153] It seems obvious that the basic intention of the draftsmen of this provision was to make applicable to the grave breaches of the Convention the alternative procedures found in many extradition treaties: *aut dedere aut punire*, either deliver or punish.[154] The Party in whose territory the person who is alleged to have committed a grave breach of the Convention is found, may, even if it is not a belligerent, and if its national laws permit, try the individual concerned in its own courts. If it does not desire to, or cannot, do so, it may, again if its national laws permit, grant extradition of the accused to the Party which has requested it and which, as is frequently required in connection with requests for extradition, has produced evidence constituting a *prima facie* case.

This procedure was undoubtedly intended to cover all conceivable contingencies in order to ensure that persons charged with grave breaches of the Convention would not be able to seek and obtain permanent asylum in neutral States and thereby avoid trial and punishment for their offenses. Admirable and salutary as the provision is, it is extremely probable that it does not attain the desired result. Assume a war between Graustark and Ruritania, both Parties to the Convention. A Ruritanian, charged with the grave breach of physical torture of Graustarkian prisoners of war detained by Ruritania on the territory of its ally, Grand Fenwick, another Party to the Convention, makes his way to the United States, a neutral and also a Party to the Convention. Graustark demands that the United States either try him in its own courts for the grave breach of the Convention allegedly committed by him or turn him over to Graustark for trial, at the same time submitting to the United States evidence constituting a *prima facie* case against him. The United States cannot try him, as he is not subject to its civil criminal law (he has committed no offense within the territorial jurisdiction of the United

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[152] *British Manual*, para. 639 n.1; Draper, *Recueil* 157. A proposal to limit the obligation to "search for" (and extradite) to the belligerents was made at the 1949 Diplomatic Conference but it was not adopted. 2B *Final Record* 87.

[153] It should be emphasized that this provision relates to grave breaches only and not to other breaches of the Convention.

[154] In Draper, *Recueil* 159, the statement is made that "[t]he Grotius principle of *aut dedere aut punire* has been rejected." This appears to somewhat overstate the case.

States),[155] nor is he subject to its military law[156] (in which case the place of the commission of the offense would not matter).[157] The United States cannot extradite him because, even assuming that there is an extradition treaty with Graustark,[158] this grave breach would not be extraditable under present United States law.[159] The alleged offender has acquired a haven from prosecution. And, unfortunately, there are many variations of the hypothetical set of facts given above in which the result would be the same (the neutral sanctuary is not a Party to the Convention, the fugitive is a national of the State in which he has found refuge,[160] the offense with which he is charged

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[155] In Yingling & Ginnane 426, the authors state: "In the case of the United States, whose regular courts generally exercise jurisdiction only over crimes committed within their territorial jurisdiction, legislation may be required to provide for the trial, or permissively allow the extradition, of persons who are accused of having committed grave breaches in a conflict to which the United States was not a party." Article 1(2) of the United Kingdom's *Geneva Conventions Act, 1957*, obviates this problem by endowing British courts with jurisdiction to try cases falling within its purview "as if the offense had been committed" at the place of trial. The adoption of the proposal made in sec. 208(f) of the 1971 *Report of the National Commission on Reform of Federal Criminal Laws* would partially solve the problem for the United States.

[156] He is not within one of the categories of persons over whom United States courts-martial exercise their limited peacetime jurisdiction. *See* Article 2, *Uniform Code*, 10 *U.S.C.* §802. *See also, Toth v. Quarles; Reid v. Covert; McElroy v. Gagliardo.*

[157] The *Uniform Code* has no territorial limitations. *See* Article 5 thereof, 10 *U.S.C.* §805.

[158] Article 129, second paragraph, of the Convention is probably an extradition treaty within the meaning of the applicable statute of the United States (*see* note 159 *infra*) and would serve as a basis for extradition if all of the other requirements for extradition were met. However, it would be helpful, and remove doubt, if States included the grave breaches of Article 130 in their list of extraditable offenses in the extradition treaties hereafter negotiated.

[159] The United States Extradition Law (18 U.S.C. §3184) requires a complaint charging the person sought to be extradited "with having committed *within the jurisdiction* of any such foreign government any of the offenses provided for. . . ." (Emphasis added.) Most extradition treaties are to the same effect. The hypothetical offense was not committed within the territorial jurisdiction of Graustark. Under national legislation of the United States, Graustark cannot obtain extradition; and under the Convention, Grand Fenwick is under no compulsion to seek it.

[160] While the clause of the second paragraph of Article 129 concerning trial in the courts of the asylum State requires such action "regardless of nationality," this is not so with respect to the clause concerning extradition, probably because many States, particularly those of the civil law tradition, have constitutional or statutory provisions prohibiting the extradition of their own nationals.

is deemed to be political in nature,[161] etc.).[162]

Let it not be thought that this provision of the Convention is of no value. There will be many cases which will fall within its ambit and which will result in murderers, sadists, and other malefactors receiving the punishment which they deserve.[163] It is only unfortunate that the attempt to close the loophole of asylum could not have been more successful.[164]

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[161] Article 1 of the United Nations *Declaration on Territorial Asylum*, G.A. Res. 2312, 22 U.N. GAOR Supp. 16, at 81, U.N. Doc. A/6716 (1967), specifically excludes asylum when "there are serious reasons for considering that he has committed . . . a war crime . . . as defined in the international instruments drawn up to make provision in respect of such crimes." Certainly, offenses committed against prisoners of war and termed grave breaches by Article 130 of the Convention would come within the foregoing exception to the rule against extradition for political offenses.

[162] In Draper, Implementation 52, the author enumerates his complaints concerning the ineffectiveness of the second paragraph of Article 129, stating: "These provisions are riddled with the weaknesses for ensuring the application of the conventions. In the first place, war criminals and the evidence against them are not normally to be found in the same place. Secondly, some States decline to hand over the person accused to the State holding the evidence; here political motivation is paramount. The State holding the accused may have no legislation enabling such a handover to the demanding State and no treaty arrangements for that purpose. Moreover, there is no legal duty to hand over. It is a power and no more. States holding the evidence may decline to transmit it to the State detaining the accused. Further, the State detaining may decline to hand over the accused to the State holding the evidence." In Pilloud, Protection pénale 865, the author goes to the opposite extreme, contending that the duty to extradite an individual who is accused of having committed a grave breach of the Convention is absolute if the asylum State does not try him itself.

[163] The meaning of the provision in the second paragraph of Article 129 requiring the asylum State to "hand such persons over for trial to another High Contracting Party *concerned*" is not clear. (Emphasis added.) Suppose that the Soviet Union had demanded that the United States either try or extradiate to that country an American serviceman alleged to have committed a grave breach of the Convention in Vietnam. Would the Soviet Union be a High Contracting Party "concerned"? (The United States, unlike many countries(see note 160 *supra*), will extradite its own nationals. *See Charlton v. Kelley.*) Unfortunately, the Diplomatic Conference which drafted the 1977 Protocol I elected to draft and include as Article 88 thereof another innocuous and toothless extradition provision.

[164] The proposal contained in Article 78 of the 1973 Draft Additional Protocol would have solved some, but not all, of the problems connected with extradition on a charge of having committed one of the grave breaches denounced by Article 130 of the 1949 Convention. A far better model, and one which eliminates all of Colonel Draper's complaints (note 162 *supra*), would be Article 7 of the 1970 Hague *Convention for the Suppression of Unlawful Seizure of Aircraft*, particularly if supported by other appropriate provisions comparable to those contained in Articles 5, 6, 8, and 10 of that Convention. (Almost identical provisions will be found in Articles 7, 4, 6, 8, and 11 of the 1971 Montreal *Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation.*)

4. Judicial Safeguards

In this chapter we have been, and we continue to be, concerned with what have been termed "war crimes," that is, violations of the law of war. However, the only war crimes which concern us here are those involving violations of that aspect of the law of war which provides for the protection of prisoners of war. In view of the rather strange history of the provision with respect to judicial safeguards to which persons accused of this type of offense are entitled, a brief historical review of the subject is warranted.

When the war in the Pacific ended in 1945, General Yamashita, who had commanded the unsuccessful defense of the Philippines, was charged with a number of war crimes and was brought to trial before a Military Commission by the United States in Manila. His counsel contended that as a prisoner of war he was entitled to all of the judicial safeguards of the 1929 Convention. Some of these protections were denied to him and, on appeal to the United States Supreme Court (after his conviction and death sentence), the denial was affirmed on the ground that the judicial safeguards contained in the 1929 Convention applied only to trials for postcapture—not precapture—offenses.[165]

The 1947 Conference of Government Experts recommended, as one variation from the 1929 Convention to be included in the new convention that was then being formulated, a provision that prisoners of war should enjoy the protection of that convention "until a *prima facie* case is made out against them and they are indicted of war crimes."[166] However, the ICRC did not follow this recommendation, the proposal that it actually made to the 1948 Stockholm Conference being a rather complex one that attempted to draw a distinction between precapture offenses constituting "serious breaches of the laws and customs of war" (the benefits of the convention would be retained until conviction) and other precapture offenses (the benefits of the convention would be retained even after conviction).[167] The Stockholm Conference eliminated part of the ICRC proposal, thereby itself making a proposal under which a prisoner of war accused of having committed a precapture offense, no matter what its nature, would be

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[165] *Application of Yamashita*, 327 U.S. 1 at 22 & 24. This position was adopted generally by war crimes tribunals and national appellate courts after World War II, although in 1950 the French Court of Cassation took the opposite view. Pictet, *Commentary* 413–14. In Trainin, *Hitlerite Responsibility* 88, the following statement appears: "On account of these inhuman crimes committed by him, Ritz ceased to be a soldier, even before he was seized by units of the Red Army, and consequently did not become a war prisoner when he was seized."

[166] 1971 GE Report 203.

[167] Article 74, *Draft Revised Conventions* 105. It will be noted that each of these alternatives was contrary to the rule of the *Yamashita Case*.

entitled to the benefits of the convention even if convicted.[168]

At the 1949 Diplomatic Conference the Soviet Union proposed an amendment to the Stockholm draft under which, once a prisoner of war had been convicted of a war crime (apparently this meant a conventional war crime) or a crime against humanity, he would be treated as an ordinary criminal until he had completed his sentence.[169] The Soviet delegate (Slavin) emphasized that the Soviet proposal applied only to prisoners of war who had been convicted.[170] The Committee to which the proposal was made reported to the Plenary Meeting, calling attention to the differences of approach between the Stockholm draft and the Soviet proposal, and stated that the great majority of the Committee considered that even after a prisoner of war had been convicted of a precapture violation of the laws and customs of war, he should continue to enjoy the protection of the Convention.[171] The Plenary Meeting of the Diplomatic Conference rejected the Soviet proposal and approved the Stockholm draft provision,[172] which became Article 85 of the 1949 Convention.

The effect of Article 85 was, then, to change the rule expounded in the *Yamashita* case and in similar cases of other countries.[173] Now a prisoner of war is to retain the full benefits of the Convention from the moment of capture to the moment of release and repatriation. If, while in captivity in the status of a prisoner of war, he is tried for a precapture violation of the law of war, including the provisions of the Convention, he is entitled to all the judicial safeguards there-

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[168] Article 74, *Revised Draft Conventions* 82.

[169] The proposed amendment stated:

> Prisoners of war convicted of war crimes and crimes against humanity under the legislation of the Detaining Power, and in conformity with the principles of the Nuremberg Trial, shall be treated in the same way as persons serving a sentence for a criminal offence in the territory of the Detaining Power.

2A *Final Record* 319. Note that the third category of war crimes enumerated in the *London Charter* (crimes against peace) was not included in the Soviet proposal.

[170] 2A *Final Record* 321. In a statement made to the Plenary Meeting, another Soviet delegate (Skylarov) said that under the Soviet proposal prisoners of war guilty of war crimes or crimes against humanity, "once their guilt has been established and they have been sentenced by a regular court," should no longer enjoy the benefits of the Convention. 2B *Final Record* 303.

[171] 2A *Final Record* 570–71. In supporting the Soviet proposal in the discussion at the Plenary Meeting, the Czechoslovak delegate pointed out that it "concerns those prisoners of war who have been convicted" (2B *Final Record* 305), and the Bulgarian delegate stated that "it is assumed that sentence has already been pronounced" and that "we are dealing with war criminals convicted as such." *Ibid.*, 307.

[172] *Ibid.*, 311. The Soviet proposal was rejected by a vote of 8–23–7. The only change made by the Diplomatic Conference in the Stockholm draft was a stylistic change in the English version.

[173] Yingling & Ginnane 410; Esgain & Solf 576; *Public Prosecutor v. Koi*, [1968] A.C. at 858.

of,[174] and, even if convicted, he continues to be entitled to the protection of the Convention.

The Soviet Union and all of the other Communist countries, both those present at the 1949 Diplomatic Conference and those which have subsequently adhered to the Convention, have made reservations to Article 85.[175] This fact caused some concern to the United States Senate when it was asked to give its advice and consent to the ratification of the Convention by the President.[176] That there was a basis

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[174] Pictet, *Commentary* 425. After World War II a number of individuals were tried and convicted of being responsible for unfair trials of prisoners of war. *See* note 87 *supra*. The list of judicial safeguards has been considerably amplified by Article 75(4) and (7) of the 1977 Protocol I.

[175] The reservation to Article 85 made by the Soviet Union at the time of signature (1 *Final Record* 355) and maintained at the time of ratification states:

> The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremburg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

In response to an inquiry concerning the meaning of the foregoing reservation, the Soviet Foreign Ministry said, in a note dated 26 May 1955, to the Swiss Federal Council:

> [T]he reservation . . . signifies that prisoners of war who, under the law of the USSR, have been convicted of war crimes or crimes against humanity must be subject to the conditions obtaining in the USSR for all other persons undergoing punishment in execution of judgments by the courts. *Once the sentence has become legally enforceable*, persons in this category consequently do not enjoy the protection which the Convention affords.

Quoted in Pictet, *Commentary* 424–25 (emphasis added).

[176] In its report to the Senate the Committee on Foreign Relations said:

> [I]n the light of the practice adopted by the Communist forces in Korea of calling prisoners of war "war criminals," there is the possibility that the Soviet bloc might adopt the general attitude of regarding a significant number of the forces opposing them as ipso facto war criminals, not entitled to the usual guaranties provided for prisoners of war. As indicated above, however, the Soviet reservation expressly deprives prisoners of war of the protection of the convention only after conviction in accordance with the convention.

1955 Senate Report 28–29. For some of the factors which caused the Senate perturbation, see note 36 *supra*. The ratification of the United States included an objection to the Soviet and other similar reservations, but agreed that the Convention would enter into effect between the United States and the reserving States except for the clause affected by the reservation. Pilloud, Reservations 412–13; Baxter, Geneva Conventions of 1949 before the United States Senate, 49 *A.J.I.L.* 550, 554. *See also Reservations to the Convention on Genocide*, Advisory Opinion, [1951] *I.C.J. Reports* 15 & 27. The ratifications of Australia, New Zealand, and the United Kingdom not only objected to the reservations to Article 85, but stated that those countries did not regard such reservations as valid and would regard application thereof as a breach of the Convention.

for this concern has been demonstrated by the events in Vietnam.[177] It is apparent that some, but hopefully not all, of the Communist reservations will be construed to permit the denial of the benefits of the Convention merely by labeling the captured individual, who clearly falls within one of the categories listed in Article 4,[178] a "war criminal."

With the foregoing in mind, let us now attempt to ascertain just what judicial safeguards the 1949 Diplomatic Conference sought to ensure for persons accused of precapture offenses in which prisoners of war were the victims; and what judicial safeguards, if any, they will actually receive.

As we have seen, the inclusion of a provision guaranteeing judicial safeguards to all persons being tried for grave or other breaches of the Convention originated in the second ICRC proposal with regard to the suppression of violations of the Convention.[179] It ultimately became the fourth paragraph of Article 129 of the Convention, and provides that the judicial safeguards "shall not be less favorable than those provided by Article 105 and those following of the present Convention." Inasmuch as judicial safeguards are included in a number of articles other than Article 105 and those following, at first reading this provision may appear to be in conflict with the provisions of Article 85, discussed above. Closer study will disclose that such is not the case.

A prisoner of war being tried by the Detaining Power for an offense, whether alleged to have been committed before or after capture, is entitled to all of the judicial safeguards enumerated in the Convention. Accordingly, when an individual falling within one of

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[177] Despite the fact that its reservation removed prisoners of war from the protection of the Convention only after they had been "prosecuted for and convicted of [*poursuivis et condamnés*] war crimes," North Vietnam insisted that captured members of the armed forces of the United States were "major [war] criminals caught *in flagrante delicto*" and, presumably, in view of the treatment which they received, not entitled to the status of prisoners of war nor to the protections of the Convention. *See* 5 *I.L.M.* 124 (1966) and 5 *I.R.R.C.* 527 (1965). Thus, it stated:

> The mere killing of one country-man of ours, whether combatant or not, even with a rifle shot, the mere destruction of a hut, of a bush in our countryside is enough to turn the American pirate into a criminal. . . .

Juridical Sciences Institute, *U.S. War Crimes in Viet Nam* 203. This is based upon the doctrine of the just war which was repeatedly rejected in the war crimes trials conducted after World War II. *The Justice Case*, 3 TWC at 1027; *Trial of Willy Zuehlke*, 14 *LRTWC* at 144; Kelly, PW's as War Criminals 94–95. *But see* U.N., *Human Rights*, A/8178, para. 15. *See also* note I-157 *supra*. Pinto apparently considers that the North Vietnamese reasoning accorded with its reservation. Pinto, Hanoi et la Convention de Genève, Le Monde, 27 December 1969 at 2, col. 1. This author does not (Levie, Maltreatment in Vietnam 348–49); nor does the ICRC. ICRC *Annual Report*, 1969 at 37.

[178] *See* pp. 34–84 *supra*.

[179] *See* note 128 *supra*.

the categories enumerated in Article 4 of the Convention allegedly commits an offense which is a violation of the Convention and is subsequently captured, he becomes a prisoner of war and is entitled to all of the benefits of prisoner-of-war status, including all of the safeguards contained in Articles 84–88 and 99–108, inclusive, if he is thereafter compelled to answer to a charge of having committed the precapture offense.[180] On the other hand, when an individual who does not fall within any of the categories enumerated in Article 4 allegedly commits an offense which is a violation of the Convention and subsequently comes under the power of the enemy State, he does not become a prisoner of war, and he is only entitled to the safeguards of Article 105 and those following when he is tried.[181] Similarly, if such an individual is tried by a neutral State for a grave breach of the Convention under the second paragraph of Article 129, he would not have prisoner-of-war status and he would therefore be entitled only to the safeguards of Article 105 and those following.[182]

D. MISCELLANEOUS PROBLEMS

Any discussion of the imposition of penal sanctions for maltreatment of prisoners of war would not be complete without at least a reference to a few of the major problems in this regard which arose in the post–World War II war crimes trials and some indication of how it can be expected that those problems will be solved in the future, based either upon provisions of the 1949 Convention, or the very failure of the Convention to include such provisions.

1. Type of Court

Article 102 of the Convention provides that a prisoner of war may be tried only by the same courts as in the case of a member of the armed forces of the Detaining Power.[183] There is, accordingly, no problem in this regard with respect to the trials of prisoners of war for violations of the Convention. But what of the trial of an individual who is not a prisoner of war for such an offense? There are four possible methods of trying such a person: (1) by the same national courts, civil or military, that would try a prisoner of war

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[180] *British Manual*, para. 638(2); *U.S. Manual*, para. 505c, 178b. A discussion of those judicial safeguards will be found in Chapter V.

[181] *British Manual*, para. 638(3); *U.S. Manual*, para. 505c; Fourth Convention, Article 146, fourth paragraph. Of course, there is nothing to preclude a State from permitting an accused who is not a prisoner of war to benefit from the more protective prisoner-of-war provisions.

[182] Individuals falling within any of the categories set forth in Article 4A who enter neutral territory in order to escape capture (*not* escapees) are interned (Article 11, *Hague Convention No. V of 1907*) and, with certain specified exceptions, are entitled to "be treated as prisoners of war" by the neutral State (Article 4B(2) of the 1949 Convention), but are not prisoners of war (note I-196).

[183] *See* pp. 335–336 *supra*.

for such an offense;[184] (2) by national tribunals specifically created for the purpose;[185] (3) by ad hoc international tribunals;[186] and (4) by a permanent international tribunal, either one created by the Parties to the Convention,[187] or an International Criminal Court.[188] In view of the absence of any provision of the Convention or of international law specifically answering the question posed above, it would appear likely that some Detaining Powers will opt for the use of their national courts, civil or military as the case may be, while others will create special tribunals for the purpose, as was frequently done after World War II. (The establishment of any type of international court is not considered to be within the realm of possibility in the foreseeable future.) However, it must be borne in mind that, unlike the situation after World War II, whatever the trial court, Article 106 provides that the accused must have a right of appeal "in the same manner as the members of the armed forces of the Detaining Power."[189]

2. Time of Trial

There is nothing in the Convention, nor in international law generally, which prohibits the trial of a prisoner of war, or other accused,

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[184] This would be the most simple solution and a not unfair one overall. Assuming, as we have, that the 1949 Convention gives prisoners of war the maximum protection possible in this era of mankind against unfair acts of the Detaining Power, there does not appear to be any reason why persons other than prisoners of war being tried for acts directed against prisoners of war should not be tried by the same courts that would try prisoners of war for these offenses. Pilloud, Protection pénale 868, suggests the possibility of combining this method of trial with an appeal to an international court. A somewhat similar suggestion, in a different context, is made in paragraph 8(b) of the 1973 NGO Memorandum. *See* note I-214 *supra*.

[185] This was frequently the method following after World War II. Pictet, *Commentary* 623, rejects it rather summarily. So does Draper, Human Rights 340–41.

[186] This was the method followed after World War II which saw the creation of the I.M.T. and the I.M.T.F.E. Roling, *Recueil* 356, considers that these courts were multinational, rather than international. As long ago as 1872, Gustave Moynier, one of the founders of the Red Cross, proposed the creation of such a court. 1971 GE Documentation, II at 45 n.124.

[187] The International Commission proposed by the author to determine the existence of a state of international armed conflict and to impose sanctions when its decision is disregarded and the Convention is not applied by a belligerent (pp. 19–22 *supra*) could also serve in this capacity.

[188] There have, of course, been many attempts to create an International Criminal Court, all unsuccessful. *See, e.g.*, the summary of United Nations actions in this regard, U.N., *Human Rights*, A/7720, para. 126. Unofficial efforts continue. *See* 1971 GE Report, paras. 558–60; Stone & Woetzel (eds.), *Toward a Feasible International Criminal Court;* First International Criminal Law Conference, *The Establishment of an International Criminal Court.*

[189] This could, but probably should not, be interpreted as meaning an appeal to the identical court to which a convicted member of the armed forces of the Detaining Power would appeal.

during the course of the armed conflict, for a violation of the Convention or of any of the other laws and customs of war. It has, however, been the custom to postpone such trials until the termination of hostilities, probably because of a fear that the enemy will counter with trials which will be only a thinly disguised form of reprisal. Inasmuch as wars usually end in victory for one side and in defeat for the other (stalemates such as Korea are the exception, rather than the rule), the impression has grown that only individuals on the defeated side are ever tried, even for conventional war crimes.[190] But trials of one's own personnel for breaches of the Convention and of other laws and customs of war, as they do not raise the specter of reprisals, can be, and often are, conducted during the course of hostilities by States which follow the rule of law and expect their citizens, civilian and military, to do likewise.[191]

While there was never any concrete proposal made at the 1949 Diplomatic Conference that trials of prisoners of war for precapture offenses should be postponed until the cessation of hostilities, the matter was the subject of inconclusive discussion during the debate on Article 85, two delegates (Lamarle of France and Slavin of the Soviet Union) expressing the opinion that such trials should not be postponed until the termination of hostilities and one delegate (Gardner of the United Kingdom) expressing the opposite view.[192] The ICRC has long taken the position that, if such a trial is conducted during the course of hostilities, an accused does not have a fair opportunity to produce all of the evidence which might be available to disprove

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[190] This subject is discussed in Roling, *Recueil* 336 & 429.

[191] *See* Baxter, Compliance 85. The My Lai incident was investigated and charges were preferred in *United States v. Calley* in 1969 while the United States was still involved in Vietnam. *See* the Report of the Investigation into the My Lai Incident, 14 March 1970 (the "Peers Report"). *See also United States v. Griffen.* The *U.S. Manual*, para. 507b states:

> The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.

(Prisoners of war detained by the United States are subject to its military law [Article 2(9), *Uniform Code*, 10 *U.S.C.* §802(9)] and would, therefore, be prosecuted under the Code.) The *British Manual*, para. 637 n.3 states that members of the British armed forces who commit war crimes are tried under the appropriate Service Act.

[192] 2A *Final Record* 319–20. In the Yamashita case, the contention was advanced that a military tribunal was incompetent to try a case alleging a violation of the law of war after the cessation of hostilities. The United States Supreme Court held (327 U.S., at 12) that this power continued until the formal state of war had ended by treaty or proclamation, "[f]or only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial."

or lessen his responsibility.[193] As we have seen, a number of prisoners of war were tried for alleged precapture offenses during the course of World War II.[194] While their problems were not created solely by the fact of the time of trial, the patent unfairness of those trials glaringly reveals the danger of trials for precapture offenses conducted during the course of hostilities. On the other hand, when trials are postponed until after the termination of hostilities, the deterrent effect of widespread publicity of prompt punishment is lost.[195]

3. Status of the Accused

Breaches of the 1949 Convention may be committed both by members of the armed forces and by civilians. After World War II individuals in both of these categories were tried for their offenses.[196] As to military personnel, there does not appear to be any problem. During the course of the hearing conducted by the Committee on Foreign Relations of the United States Senate on the 1949 Conventions for the Protection of War Victims, the question was asked whether the grave-breaches provisions of the Convention would apply to "private persons" or whether they would apply only to "Government officials."[197] A somewhat equivocal answer having been given to that question, the Department of Justice felt it appropriate to clarify the situation and did so in a letter to the Chairman of the Committee. It included the following statement:

> In a related question, Senator Mansfield asked whether the articles dealing with grave breaches could result in imposing criminal liability upon persons without official status. Generally, the acts designated as grave breaches are to be treated as such only when they are in some way the result of action by civilian or military agents of a detaining or occupying power in violation of the conventions. Moreover, as a practical matter, only persons exercising governmental authority ordinarily would be in a position to commit grave breaches against protected persons, such as the serious mistreatment of prisoners of war . . . We are reluctant to state that the mistreatment of a person protected by the con-

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[193] Pictet, *Commentary* 422 & 626. *See also* Kelly, PW's as War Criminals 95. *Compare* Draper, *Recueil* 148–49.

[194] *See* note 87 *supra.*

[195] Certainly, it is neither necessary nor advisable to apply this rule of delay to postcapture offenses as was done in the case of the common criminals at the prisoner-of-war camp at Koje-do, Korea, who rioted, wantonly destroyed property, murdered fellow prisoners of war, etc., and went completely unpunished because they were not promptly tried, probably because of the fear of reprisal trials.

[196] The trials conducted by the IMT and the IMTFE both involved military and civilian accused. While the majority of the accused in the post–World War II war crimes trials were members of the armed forces, and probably always will be, there were quite a number who were civilians. *See, e.g., Zyklon B Case; Belsen Trial; I. G. Farben Case;* etc.

[197] 1955 Hearing 31.

> ventions by a private person (e.g., the killing of a wounded airman) could never constitute a grave breach no matter what the intent and circumstances. However, it is entirely clear that these provisions of the conventions were not intended to convert into grave breaches every common crime in which the victim happens to be a person protected by the conventions.[198]

Except for the possible intent of the last sentence quoted, this statement appears to be appropriate. As to the last sentence, if it merely means that a member of the civilian population accused of having committed a common law offense, such as murder, against a prisoner of war, should be tried for that common law offense, and not for a grave breach of the Convention, there is no reason to dispute its propriety. However, no impression should be permitted to be conveyed that members of the civilian population, whether or not they have official status, are not amenable in some manner to punishment for grave breaches of the Convention.[199]

4. The Defense of Superior Orders

The defense that the accused was ordered by a superior to commit the act subsequently charged as an offense, and that he had no alternative but to comply, was probably the affirmative defense most frequently advanced in post–World War II war crimes trials. It was almost uniformly rejected as a defense, but was usually considered in

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[198] *Ibid.*, 58–59.

[199] *See, e.g., The Essen Lynching Case.* There does not appear to be any basis whatsoever for the statement appearing in Castrén, 86, that only uniformed military personnel can commit war crimes. Greenspan, *Modern Law* 464, properly states that war crimes may be committed "both by and against members of the armed forces and civilians." The summary on this problem appearing in the "Digest," 15 *LRTWC* 59, states the law with respect to this matter fully and clearly:

> [T]o itemise the different categories of persons who have been found guilty of war crimes and related offences is important in view of the argument sometimes previously advanced that only military personnel could be held so guilty. Those actually found so guilty have included not only soldiers, but civilians coming within the categories of administrators, political party officials, industrialists, judges, prosecutors, doctors, nurses, prison wardens, and concentration camp inmates. Soldiers held guilty have included not only the rank and file, but high-ranking officers and chiefs of staff. *It is clear that the mere fact of being a civilian affords no protection whatever to a charge based upon international criminal law.* (Emphasis added.) Article 75(2) of the 1977 Protocol I prohibits a number of acts therein listed "whether committed by civilian or by military agents."

mitigation of sentence.[200] It is a defense which has had a long and checkered history. Even prior to World War I, the German Military Penal Code provided that the subordinate could only be punished for complying with the order of a superior if he knew that the act ordered constituted a violation of a law.[201] This provision was applied during the course of the Leipzig Trials which followed that War.[202]

In 1940 the United States Army published a military manual which provided that members of the armed forces would not be subject to punishment for war crimes "committed under the orders or sanction of their government or commanders."[203] In November 1944 this was changed by the total elimination of the provision in which the quoted matter had appeared and by the insertion of a new subparagraph providing for the punishment of individuals who violated the laws and customs of war and for the defense of superior orders to "be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment."[204]

The Charter of the International Military Tribunal (IMT) was very specific on this point. Article 8 stated:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[205]

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[200] This problem has been dealt with so extensively elsewhere that only a brief resumé is given here. For definitive studies of the subject of "superior orders," see Dinstein, *Superior Orders* and Green, *Superior Orders*. For a summary of national laws applied in various post–World War II war crimes trials, see 5 *LRTWC* 13–22, especially 19–22. *See also*, Trainin, *Hitlerite Responsibility* 80. A succinct statement presenting broad coverage of the subject may be found in *British Manual*, para. 627 n.2.

[201] *German Military Penal Code*, para. 47(2), quoted in 11 *LRTWC* 46. *See also* Sack, Punishment of War Criminals and the Defence of Superior Orders, 60 *Law Q. Rev.* 63, 65 (1944).

[202] *See note* 11 *supra*. In the *Llandovery Castle Case*, the Supreme Court of Leipzig refused to accept superior orders as a defense to the killing of unarmed persons in a lifeboat, an obviously illegal order, but did consider it in mitigation of sentence. On the other hand, the defense of superior orders was sustained in the *Dover Castle Case*, where the accused were found to have been unaware of the illegality of the order.

[203] U.S. Army, Basic Field Manual 27–10, *Rules of Land Warfare*, para. 347. The comparable manual of the British army, *Laws and Usages of War on Land*, para. 443, was to the same general effect.

[204] Change 1, 15 November 1944, to Basic Field Manual 27–10. The comparable provision of the *British Army Manual* had been changed in April 1944 to provide that superior orders do not "in principle, confer upon the perpetrator immunity from punishment."

[205] The Charter of the International Military Tribunal for the Far East, Article 6 was to the same effect. The rules promulgated by the various military commanders of the United States for the trials of war criminals followed this principle and not that quoted in the text above and cited in note 204 *supra*.

The defense was, of course, raised at the trial and the Tribunal dealt with it in short order, holding:

> That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[206]

The Commission of Experts convened by the ICRC in December 1948 in connection with the grave-breaches provisions which had been approved and the Resolution which had been adopted by the 1948 Stockholm Conference, drafted a proposed article relating solely to the defense of superior orders.[207] The 1949 Diplomatic Conference did not include such a provision in the Convention as finally approved. Accordingly, this problem will once again have to be resolved on a national basis. Efforts to solve it on an international basis in related areas have been undertaken by various organs of the United Nations, but those efforts have complicated, rather than clarified, the problem.[208] It is obvious that there is no clear and well-defined rule which will be applied to the defense of superior orders when it is advanced, as it undoubtedly will be, in future trials for violations of the grave-breaches and other provisions of the 1949 Convention. However, it is believed that it may be safely stated that, as after World War II, the mere fact that the act complained of was committed pursuant to superior orders will not suffice as a defense.[209]

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[206] *I.M.T.* 466. The extent of the "moral choice" referred to by the IMT was the subject of discussion in two of the major cases which followed the IMT trial, *High Command Case* (at II T.W.C. 509) and *Einstazgruppen Case* (at 4 T.W.C. 71).

[207] Proposed Article 119(b), Remarks and Proposals 64–65. It stated:

> The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may neverthless be mitigated or remitted, if the circumstances justify.

[208] *See* Dinstein, *Superior Orders* 217–23 & 226–52; Green, *Superior Orders* 235–41 & 357–65. The 1971 GE Report, para. 566, indirectly suggests as a guide Principle IV of the *ILC* Nürenberg Principles. See also Article IV, *ILC* Draft Code.

[209] *U.S. Manual*, para. 509 states:

> a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military of civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, *unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.* In all cases where the order is held not to constitute a defense to an allegation of

5. Command Responsibility

In discussing the defense of superior orders it appears appropriate to give at least passing notice to two connected problems: the responsibility of the superior himself for the illegal act committed pursuant to his order; and his responsibility for the illegal acts of his subordinates committed without his orders. As to the first such problem, the 1949 Diplomatic Conference specifically provided the answer, at least insofar as grave breaches are concerned, when it provided in the first paragraph of Article 129 that the national penal legislation to be enacted should provide for "effective penal sanctions for persons committing, *or ordering to be committed,* any of the grave breaches of the present Convention."[210] (Emphasis added.) There is no reason to believe that this provision, which expresses a rule which had previously been true, is not equally applicable to *all* violations of the Convention. Any other decision would be completely illogical. Even in the absence of such a provision of law as that now to be found in the first paragraph of Article 129, persons guilty of ordering a war crime to be committed, although not themselves participating in the actual offense, were punished after World War II.[211]

As to the problem of the responsibility of the superior for the illegal acts of his subordinates committed without his orders and, perhaps, without his knowledge, no provision is made in the Convention, so once again it will be necessary to have recourse to the general rules of international law. It was fairly well established after World War II that a commander is responsible when he fails in his duty to control the operations of the members of his command by permitting them to commit violations of the laws and customs of war and, hence, of the

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war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

b. In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; . . . (Emphasis added.)

See also Manual for Courts-Martial, para. 216d. The comparable provision of the *British Manual,* para. 627 is much less detailed but is to the same general effect. (Article 77 of the 1973 Draft Additional Protocol contained a provision with respect to the defense of superior orders. However, it was not included in the 1977 Protocol I.)

[210] Pictet, *Commentary* 622 points out that the provision does not establish responsibility for those who could, but do not, intervene to prevent or to put an end to a breach of the Convention. (Of course, this limitation would not apply to the responsible commander.) Articles 62 and 63 of the *Code pénal français* specifically make such failures to act punishable offenses.

[211] *See, e.g., Dostler Trial; Abbaye Ardenne Case;* and the *Trial of Baba Masao.*

Convention;[212] or when, having learned of such violations, he fails to take any action to punish the individuals responsible or to prevent their recurrence.[213] There seems little doubt that the same rule will be applied in future cases.[214] However, if the commander did not know, and could not reasonably have learned, of the intent to commit a violation of the Convention, and does not thereafter learn that it has been committed, it would be difficult to advance a legal basis upon which he could be held responsible.[215]

6. Permissible Punishments

After World War II all of the nations trying war crimes cases took the position that under international law the punishment of death could be adjudged against any person tried and found guilty of *any* violation of the laws and customs of war. However, as a matter of practice, in only a very few cases not involving the death of the vic-

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[212] The decision in the Yamashita case, which firmly established this principle, was generally followed. *See, e.g., I.M.T.F.E.* 29–32.

[213] The following appears in *I.M.T.F.E.* 32:

> If crimes are committed against prisoners [of war] under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

In his dissenting opinion, Judge Röling said (at 59–60):

> To hold an official criminally responsible for certain acts which he himself did not order or permit, it will be necessary that the following conditions are fulfilled:
>
> 1. That he knew or should have known of the acts.
>
> * * * *
>
> 2. That he had the power to prevent the acts.
>
> * * * *
>
> 3. That he had the duty to prevent these acts.

There can be no quarrel with these requirements.

[214] In *U.S. Manual*, para. 501 the following rule is laid down:

> The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

British Manual, para. 631 is practically identical with the foregoing. For a similar problem of vicarious responsibility, see pp. 52–53 *supra*. Article 86(2) and 87 of the 1977 Protocol I affirmatively create such command responsibility.

[215] Article 131 precludes a Party from absolving itself or an ally from any "liability" for a breach of any of the provisions of Article 130. The meaning of this provision is far from clear. Lauterpacht-Oppenheim 395. Article 3 of the *Hague Convention No. IV of 1907* provides for monetary compensation for violations of the Regulations attached thereto, a number of which relate to prisoners of war. After World War I (1914–18) the *Treaty of Versailles* (1919) included (in Annex 1 to Article 232), as an item of German reparations, "[d]amage caused

tim or victims was the death penalty adjudged, or, if adjudged, confirmed.[216]

There has been a noticeable tendency to adopt on a permanent basis a more flexible policy with respect to the punishment to be adjudged against individuals convicted of offenses such as the grave breaches of the 1949 Convention—a policy of "letting the punishment fit the crime." Thus, the United Kingdom's *Geneva Convention Act* (1957) provides for life imprisonment in the event of the wilful killing of a prisoner of war and for imprisonment for not more than 14 years for any other grave breach of the Convention.[217] The Netherlands has enacted a law which punishes with death or with imprisonment for periods ranging from 10 years to life various violations of the laws and customs of war committed under varying circumstances.[218] The Soviet Union has enacted a law which provides for imprisonment for a period of from 1 to 3 years for the ill-treatment of prisoners of war which occurs frequently or is characterized by particular cruelty.[219] And the official United States Army interpretation of the rule of international law as to permissible punishments for violations of the laws and customs of war is that, while the death penalty may be adjudged for grave breaches of the Convention, the punishment actually imposed "must be proportionate to the gravity of the offense."[220] The ICRC has taken a position which displays an understanding of the problem and an appreciation that any solution pro-

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by any kind of maltreatment of prisoners of war." Article 91 of the 1977 Protocol I is quite similar to Article 3 of the *Hague Convention No. IV of 1907*. The ICRC apparently takes the position that Article 131 was intended to prevent the victor from compelling its defeated foe to relinquish claims which it might validly have for monetary compensation in any armistice agreement or peace treaty into which they enter. Pilloud, Sanctions pénales 311; Pictet, *Commentary* 630. If this is the intent of the article, it seems rather unimportant as a method of ensuring compliance with the provisions of the Convention.

[216] Digest, 15 *LRTWC* 200–02. In preparing that study in 1949, the United Nations War Crimes Commission said (at 201):

> It seems that, despite the fact that international law has previously permitted the death sentence to be passed for any war crime, some kind of international practice is growing according to which Allied Courts, apart from avoiding inhumane punishments, have themselves attempted to make the punishment fit the crime; any habitual practice of this kind would tend in time to modify the general rule that any war crime is punishable by death.

[217] *See* p. 372 *supra*. It will be noted that no provision is made therein for the punishment of other than grave breaches of the Convention. The *British Manual*, para. 638 still provides that "all war crimes are punishable by death," but a note added by Amendment No. 1 calls attention to the fact that under the Act life imprisonment is the maximum authorized punishment for a grave breach of the Convention.

[218] *See* note 136 *supra*.

[219] *See* p. 372 *supra*. This law apparently applies only in trials of Soviet military personnel and not in trials of enemy nationals.

[220] *U.S. Manual*, para. 508.

posed must not be based upon undue sympathy for the individuals found guilty of maltreatment of prisoners of war in violation of the provisions of the Convention. While urging the rejection of the position that *all* violations of the law of war are punishable by death,[221] it proposes punishment proportionate to the gravity of the offense[222] and, specifically, laws providing individually for the authorized punishment for each grave breach; a general provision authorizing imprisonment for perhaps from 5 to 10 years for other breaches of the Convention which are not otherwise punished by national penal codes; and disciplinary punishment for minor offenses.[223]

E. CONCLUSIONS

It was only as a result of the atrocious maltreatment which many prisoners of war received during World War II—maltreatment which was contrary to all criteria of civilized conduct in the twentieth century—that punishment was meted out to offenders on a scale commensurate with the number and nature of the offenses committed. The need to punish those who had, in their treatment of prisoners of war, violated the laws and customs of war, highlighted the fact that pious statements guaranteeing humane treatment for prisoners of war contained in international conventions are only of moral value unless they are backed up by the guarantee of specific sanctions for violations of those statements.[224] To the individuals who violated the laws and customs of war during World War II, moral values were of little import. Through the initiative of the ICRC, provisions relating to violations of the several proposed Geneva Conventions for the Protection of War Victims were drafted and, eventually, after redrafting by the 1949 Diplomatic Conference, they became integral parts of each of those conventions, including the 1949 Prisoner-of-War Convention. Their value as a deterrent has not yet really been tested, but they have now been ratified or adhered to by all but a very few of the States constituting the world community, and sufficient time has elapsed to permit knowledge with respect to their contents to be disseminated to all levels of the armed forces, as well as to the civilian populations.[225] Should another holocaust descend upon the world, there is now advance warning to all persons who may come in contact with prisoners of war that a definite minimum standard of treatment has been established

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221 Pilloud, Sanctions pénales 300 n.1. Although the courts of all of the nations which tried war crimes cases after World War II took this same position, Pilloud designates it as the "Anglo-Saxon system."

222 *Ibid.*, 300.

223 *See* note 149 *supra.*

224 In Roling, *Recueil* 445, he paraphrases another scholar by stating: "The way to international hell seems paved with 'good' conventions."

225 *See* the discussion of the first paragraph of Article 127 at pp. 93–96 *supra.*

for them by international legislation, which likewise prescribes that punishment must and will be meted out to those who wilfully fail to comply with that minimum standard, no matter where they may seek refuge.[226] While instances of maltreatment of prisoners of war will undoubtedly continue to occur in future armed conflicts, it is to be hoped that, unlike the events of World War II, they will become the exception rather than the rule, and that the unbridled cruelties suffered by prisoners of war during that conflict will prove to have been the end of an era.[227]

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[226] Motivated by the fact that the program of war crimes prosecutions in Germany had barely escaped being terminated by the running of the German statute of limitations for criminal actions, in 1968 the General Assembly of the United Nations adopted and recommended to its members for ratification a *Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity.* This Convention, as its title indicates, would eliminate the normal statutory time limitations with respect to prosecutions for war crimes, including "grave breaches" of the 1949 Convention. It has not been widely ratified.

[227] The Diplomatic Conference which adopted Article 85 of the 1977 Protocol I clearly was not optimistic in this regard. Neither is this author.

CHAPTER VII

TERMINATION OF CAPTIVITY

A. INTRODUCTORY

As we have seen, the first paragraph of Article 5 provides that the Convention is applicable to all individuals coming within the ambit of Article 4 thereof, "from the time they fall into the power of the enemy and until their final release and repatriation."[1] Even if there is some doubt as to the right of a particular individual to prisoner-of-war status, the second paragraph of Article 5 provides that he is entitled to the protection of the Convention until a decision on his status is made by a competent tribunal.[2] To be in "the power of the enemy" (Article 5, paragraph one) or in "the hands of the enemy" (Article 5, paragraph two), an individual need not necessarily be in the custody of the enemy military forces. The airman in distress who parachutes to the earth in enemy territory is often originally taken into custody by the civilian authorities, or even by members of the civilian population.[3] No matter how it occurs, and no matter whether the action is taken by military or civilian elements of the enemy Power, as soon as he is in enemy custody he becomes a prisoner of war and is entitled to all of the protection incident to that status.[4]

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[1] *See* p. 68 *supra*, and notes I-262 and I-320. Of course, as will become apparent, captivity may also end in a number of ways other than by release and repatriation.

[2] *See* the discussion of Article 5 at pp. 55–60 *supra*.

[3] During the period of United States involvement in the armed conflict in Vietnam (c. 1965–73), North Vietnamese propaganda attributed many incidents involving the taking into custody of downed airmen to members of the civilian population.

[4] *U.S. Manual* para. 84b. Although writers sometimes refer exclusively to individuals falling into the power of enemy *military forces* (*see* pp. 34–36 *supra;* Werner, *Croix-Rouge* 281), this is probably because in the final analysis the military will take custody of all of them. Moreover, the position taken by the Japanese at the Ofuna Naval Interrogation Center during World War II that the captured naval personnel brought there for interrogation "were not as yet in any way considered prisoners of war" (*Schacht Statement* 1) violated the provisions of the 1929 Convention just as the position taken by the Chinese in Korea that the 1949 Convention was applicable "only after the prisoner [of war] had reached a stage of full repentance for his past crimes" (such as fighting against the Chinese) (U.K., *Treatment* 32) violated the provisions of the 1949 Convention. The practice of terming a captured individual a "detainee" until his true status is determined, as was done in South Vietnam (Ball, POW Negotiations 75) is only acceptable if the captured individual receives full prisoner-of-war treatment until the determination has been made in accordance with the provisions of Article 5.

The foregoing indicates generally when and how the status of prisoner of war comes into being. The question then arises, when and how does it cease to exist, when and how does it terminate? We shall find that the 1949 Convention contemplates the possibility that prisoner-of-war status may be terminated in a number of different ways, both during the continuance of hostilities and upon their cessation. In addition, we shall find that Detaining Powers have employed a number of subterfuges to terminate entitlement to prisoner-of-war status, or to avoid the requirement to terminate, not all of which have been successfully outlawed by the Convention.

B. TYPES OF LEGAL TERMINATION OF PRISONER-OF-WAR STATUS

1. Death

That the death of an individual while he is a prisoner of war will terminate that status would appear to be so obvious as to require no more than a mere mention. However, the draftsmen of the Convention considered it sufficiently important to devote a large part of three articles to the procedures to be followed when such an event occurs. Thus, upon the occurrence of the death of a prisoner of war there must be a medical examination to confirm the *fact* of death[5] and, if necessary, to establish identity (Article 120, third paragraph); deceased prisoners of war are to be honorably buried, if possible according to the rites of their religion, in graves which are to be respected, maintained, and marked, and, again, if possible, all of those of the same Power of Origin are to be buried in the same place (Article 120, fourth paragraph); burial is to be in individual graves except for unavoidable circumstances, and cremation may be used only (1) for imperative reasons of hygiene, (2) for religious reasons, or (3) pursuant to the express request of the deceased prisoner of war; and the fact of cremation and the reason therefor must be stated in the death certificate (Article 120, fifth paragraph);[6] and each Detaining Power must establish a graves registration service and transmit to the Power of Origin information concerning places of interment while responsibility for the care of the graves and the maintenance of records concerning any subsequent movements of the bodies is placed upon the Power controlling the territory in which the graves are located, if such Power is a Party to the Convention, and whether or not it was the Detaining Power at the time of death (Article 120, sixth paragraph). Moreover, death certificates, in the

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[5] Note that the medical examination is *not* for the purpose of determining the *cause* of death.

[6] These provisions were incorporated into the Convention because of a justifiable fear that cremation might be used as a method of destroying evidence of crime. 1947 SAIN 4. *See also I.M.T.* 472.

form specified in Annex IVD, or certified lists of deceased prisoners of war, must be transmitted to the Prisoner of War Information Bureau (Article 120, second paragraph)[7] and by it to the Power of Origin, through the Protecting Power, and to the Central Agency (Article 122, third paragraph).[8]

One of the several admonitory provisions of the 1949 Convention relates to this subject. The first paragraph of Article 121 provides that every death (or serious injury) of a prisoner of war "caused or suspected to have been caused by a sentry,[9] another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power." The latter must both advise the Protecting Power of the fact of the inquiry and provide it with a copy of the report thereof, including copies of the statements of witnesses (Article 121, second paragraph); and if the inquiry indicates any illegal actions on the part of any person or persons, the Detaining Power is obligated to institute appropriate prosecutions (Article 121, last paragraph).[10]

2. Exchange

During the seventeenth century the exchange of prisoners of war became the major system of terminating prisoner-of-war status while hostilities continued.[11] This occurred when continental armies became national and professional and when obtaining the prompt release of captured military personnel became accepted as the responsibility of the sovereign, rather than of the captured individual. Exchange was man-for-man and grade-for-grade, with tables of "equivalent values," so that, at least in theory, exchanges would not result in any change

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[7] Concerning this Bureau, *see* pp. 154–157 *supra*. *See also* the fifth, seventh and ninth paragraphs of Article 122.

[8] Concerning this Agency, *see* pp. 157–158 *supra*. Wills of deceased prisoners of war must also be transmitted to the Protecting Power, with a certified copy going to the Central Agency. *See* the first paragraph of Article 120 and pp. 186–187 *supra*.

[9] *See also* Article 42 and the discussion thereof at p. 403 *infra*.

[10] During World War II, 212 German and 39 Italian prisoners of war met violent or unnatural deaths while in custody in the United States. Rich, Brief History 514. These resulted from being shot by guards while attempting to escape, while engaged in altercations, or unjustifiably; from the execution of the sentences of prisoner-of-war "kangaroo courts", etc. *Ibid.*, 471 & 512; *U.S. v. Kaukoreit.* For the German procedure with respect to the shooting or serious injury of British, French, Belgian, and American prisoners of war (the directive was specifically made inapplicable to Poles, Serbs, and Russians), see *German Regulations*, No. 20, para. 224 and *ibid.*, No. 46, para. 840.

[11] It replaced ransom which had reached its peak during the era of chivalry but which had, for all practical purposes, completely disappeared by the end of the seventeenth century. One author asserts that "[f]aint though unmistakeable traces of it survive even into Napoleon's war." Lewis, *Napoleon* 43. *But see* note I-21 *supra*. *See also*, Levie, Armistice Agreement 897. Perhaps it may be said to have reappeared momentarily as a result of the sequel to the Bay of Pigs episode.

in the relative military strengths of the opposing sides.[12] Exchange still existed as late as the American Civil War (1861–65),[13] but it ceased to be a really effective procedure during that conflict.[14] During the twentieth century exchange has practically disappeared as an institution of the law of war.[15] It is not mentioned in any of the general conventions with which we are concerned, including the 1949 Convention.

3. Parole

Parole has been defined as "the promise of a prisoner of war to the detaining state that his conduct will conform to the prescriptions specified, given voluntarily in consideration of a grant of freedom of action."[16] In other words, the prisoner of war agrees to certain restrictions that are to govern his conduct in exchange for his release from confinement. The principle of parole has existed for many centuries.[17] It was an accepted and important procedure as late as the nineteenth century.[18] However, over the years it developed pri-

[12] Imbued, no doubt, with the *egalité* of the French Revolution, a Decree of 16 September 1792 of the French National Assembly (1 DeClercq, *Recueil des traités de la France 219*) provided that the rate of exchange should be man-for-man and grade-for-grade, and specifically prohibited any exchange of several subordinates for one person of higher rank. (This action apparently had little effect on general practice as a few years later Article First of the 1813 *Cartel for the Exchange of Prisoners of War between Great Britain and the United States* contained a complete table of equivalent values, beginning with the valuation of an admiral or a commanding general at 60 men and ending with the valuation of a noncommissioned officer at 2 men.) When, for some reason, a formal exchange could not be made, a prisoner of war might even then be released and repatriated in a temporary parole status until his counterpart had been repatriated and the formal exchange had thus been completed. Lewis, *Napoleon* 45.

[13] Article 1 of the so-called *Dix–Hill Cartel* (1862) was virtually identical with Article First of the 1813 *Cartel*, note 12 *supra*.

[14] The occasional procedure mentioned in note 12 *supra* was substantially the system adopted as a general procedure in the *Dix–Hill Cartel*, note 13 *supra*. Lewis & Mewha 29–30; Murphy, Repatriation 2–3 (1971 Hearings at 479). The attempt to convert a procedure which worked adequately in occasional instances with respect to a specific prisoner of war into a general procedure applicable to all prisoners of war failed to accomplish the desired result, and its operation failed to satisfy either side.

[15] *British Manual*, para. 249. One exchange of a highly limited character was attempted during World War II but did not actually take place. Lewis & Mewha 76–77. The release of four groups, each of three American servicemen, by the North Vietnamese during the period 1968–72 (Levie, Repatriation 702–03) followed by releases of North Vietnamese by the South Vietnamese were not exchanges but unilateral releases, *See* p. 147 *infra*.

[16] Flory, *Prisoners of War* 119.

[17] When the Roman General Marcus Atilius Regulus was paroled by the Carthaginians in 250 B.C. (Grady, Evolution 22–23), parole was already a well-established procedure in the law of international warfare.

[18] Lewis, *Napoleon* 39–65, ascribes the breakdown of the system of parole to the Napoleonic wars (and to Napoleon).

marily into a method of permitting a prisoner of war more freedom within the territory of the Detaining Power, rather than as a method of terminating prisoner-of-war status.[19] The *Cartel for the Exchange of Prisoners of War between Great Britain and the United States* (1813) provided for parole limited to a specified area (Article Fourth) or parole with return to the country of origin on condition of not serving in the military until exchanged (Article Fifth).[20] Few paroles were accorded under the latter provision. During the American Civil War an attempt was made to ensure major use of the principle of parole. The so-called Dix–Hill Cartel, an agreement entered into by the two sides on 22 July 1862,[21] called for both sides to discharge all prisoners of war on parole within 10 days of their capture. Prisoners of war so paroled could not serve again until exchanged.[22] As the exchange provision was not faithfully carried out by either side, the parole provision also failed of its purpose.[23] During the past century true parole, when used at all, has been employed in a sporadic, individual manner.[24]

Articles 10, 11, and 12 of both the 1899 and 1907 Hague Regulations set forth detailed rules concerning parole. As the 1929 Convention made no reference whatsoever to the subject of parole, during World War II the 1907 Hague Regulations, or customary international law (which the 1907 Hague Regulations undoubtedly represented in this respect), applied.[25] During that conflict there were various uses made of the principle of parole, some improper and some proper. The Japanese required all captured Filipinos to sign a parole; and the United States recognized the parole by the Japanese in the Philippines

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[19] A French Imperial Decree of 4 August 1811 provided for the parole of officers in order to permit them to proceed, unescorted, to their assigned places of residence. Bulletin Officiel du Ministre de la Guerre, *Le droit des gens et les conventions internationales* 263. *See also*, Abell, *Prisoners of War in Britain, 1756–1815*, at 284–315. It thus came to resemble the "assigned residence" of the first paragraph of Article 13 of the 1907 *Hague Convention No. V*, now also found in Articles 41 and 78 of the Fourth (Civilian) Convention.

[20] Article Sixth of the *Cartel* provided for punishment "according to the usages and customs observed in such cases" in the event of a violation of the parole.

[21] *See* notes 13 and 14 *supra*.

[22] The basic plan was that "each side, upon paroling prisoners [of war] of the other side, was authorized to discharge an equal number of its own officers and enlisted men from parole." Murphy, Repatriation 2–3.

[23] Lewis & Mewha 29–30.

[24] It was used to a limited extent during the Russo-Japanese War (1904–05). Takahashi, *Russo-Japanese War* 107.

[25] Article 89 of the 1929 Convention provided that the latter convention "shall be complementary to Chapter II" [Prisoners of War] of the appropriate Hague Regulations as between Parties thereto and Parties to the 1929 Convention.

of certain captured members of the United States armed forces.[26] The United States paroled Italian prisoners of war in place both in Sicily[27] and in the United States.[28] There was apparently, no other major parole program in Europe although the British did permit, and the Germans did accept from British officers exclusively, a pledge "not to flee."[29]

When the 1949 Convention was in the process of evolution, it was determined that, unlike the 1929 Convention, it should be self-contained and that it should not be necessary to refer, either explicitly or implicitly, to the 1907 Hague Regulations.[30] Accordingly, with one notable exception and one unimportant one, the provisions concerning parole which had appeared in both the 1899 and the 1907 Hague Regulations were incorporated into the last two paragraphs of Article 21 of the 1949 Convention with only minor editing. Thus, the Convention now authorizes parole, either partial or full, if the laws of the Power of Origin allow it; prohibits compulsion to accept parole;[31] requires the belligerents to exchange information concerning their domestic laws and regulations with respect to permitting their own nationals to accept parole; binds prisoners of war "who have given their promises in conformity with the laws and regulations so notified" to fulfill the conditions of the parole; and prohibits the Power of Origin from requiring or accepting from paroled prisoners of war any services which conflict with the terms of the parole which they have given. The unimportant omission from the 1907 Hague Regulations mentioned immediately above is the provision to the effect that the Detaining Power is under no obligation to grant parole at the request of a prisoner of war. This is so obvious that there was

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[26] *See* note 37 *infra*. *See also*, U.S. Congress, *Hearings on H.R. 2208, Amending the Missing Persons Act to Provide Benefits to Certain Members of the Philippine Scouts*, before Subcomm. No. 1 of the House Comm. on Armed Services, 84th Cong., 2d sess., no. 105, at 8173–74; and JAGA 1946/9604, 28 October 1946.

[27] Lewis & Mewha 178–79.

[28] *Ibid.*, 93. This was after the new Italian Government had changed sides in 1943. From the very beginning of the confinement of Italian prisoners of war in the United States their American friends and relatives had attempted, but unsuccessfully, to have individual prisoners of war paroled in their custody. Rich, Brief History 507.

[29] *German Regulations*, No. 37, para. 691. The "pledge not to flee" was therein specifically stated not to be parole.

[30] 1947 GE Report 105 & 133–34. Nevertheless, as a matter of precaution, Article 135 makes the 1949 Convention "complementary to Chapter II of the Regulations annexed to the above-mentioned [1899 and 1907] Conventions of The Hague."

[31] Flory, *Prisoners of War* 129. In addition to many cases in which the Japanese compelled captured Filipinos to accept parole against their will, the Japanese followed that procedure throughout Asia. *I.M.T.F.E.* 1084–86. *See also* note 37 *infra*.

certainly no need to include it in any convention.[32]

The provisions requiring the exchange of information concerning domestic laws and regulations with respect to parole,[33] and authorizing a Detaining Power to grant parole only when this is permitted by the laws and regulations of the Power of Origin, was necessary because many Powers have laws and regulations prohibiting members of their armed forces from accepting parole.[34] However, even in those instances where parole is prohibited, there are frequently exceptions, such as to permit a prisoner of war to obtain necessary medical treatment not available at his prisoner-of-war camp; or to allow captured medical or legal personnel, or chaplains, to visit installations where their services are required; or to allow the prisoners' representatives to visit the subsidiary installations which they represent; or for purposes of exercise or recreation; or when the senior officer present authorizes it, etc.[35]

If, having been officially advised that the laws and regulations of the Power of Origin do not permit the acceptance of parole by the members of its armd forces, a Detaining Power nevertheless paroles a prisoner of war, it would appear that the parole would be invalid and not binding either on the prisoner of war or on the Power of Origin;[36] any other interpretation would make the provision of the Convention for the exchange of information concerning laws and regulations meaningless; but if the laws and regulations of the Power of Origin permit the giving of parole and the prisoner of war enters

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[32] In 1942 Flory stated: "The detaining state is not obligated by customary international law to grant liberties on parole, and it is not required to accede to the request of a prisoner [of war] for freedom on parole." Flory, *Prisoners of War* 119–20 and sources cited therein.

[33] There was no provision for the reciprocal notification of domestic laws and regulations on parole under the 1907 Hague Regulations so that, under those Regulations, the Detaining Power could not be charged with knowledge of the applicable laws and regulations of the Power of Origin.

[34] *See, e.g., U.S. Manual*, para. 187a; Article III, *Code of Conduct; British Manual*, para. 243 & n.1, and para. 246 & n.1; Article 235(2), *Code de justice militaire français.*

[35] *U.S. Manual*, para. 187b; *British Manual*, para. 246 n.1; Preux, Homme de confiance 471, n. It should be noted that the second paragraph of Article 21 contains a sentence recommending the parole of prisoners of war, "particularly in cases where this may contribute to the improvement of their state of health." This had not appeared in any previous convention. (Article III of the *Code of Conduct* is absolute in its prohibition against the giving of their parole by members of the United States armed forces and does not seem to authorize even the limited parole permitted under *U.S. Manual*, para. 187b, issued a year later.)

[36] While Flory, *Prisoners of War* 127, makes a contrary statement, his position was based on international law as it existed prior to the 1949 Convention. He speaks of the "moral obligation" of the Detaining Power not to offer parole to a prisoner of war when the law of his Power of Origin prohibits it; that obligation is now legal rather than moral. *And see* SPJGW 1945/2310, 2 March 1945.

into a valid undertaking and thereafter violates its conditions and again bears arms against the Detaining Power which released him on parole and again falls into the power of that Detaining Power or one of its allies, historically he was not only subject to judicial punishment but he was not entitled to prisoner-of-war status.[37] Both of these possibilities were specified in Article 12 of the 1907 Hague Regulations. They were omitted from the provisions dealing with parole which were transposed to the 1949 Convention—and constitute the notable exception referred to above. The recaptured parole violator may be tried for his breach of parole; but he is entitled to prisoner-of-war status,[38] including the trial protections afforded by Articles 82-108 if he is so tried.

Classically, it was held that the individual convicted of violation of parole could be sentenced to any punishment, including death.[39] Under the first paragraph of Article 87 of the 1949 Convention, authorized punishments are limited to the penalties provided for in respect of members of the armed forces of the Detaining Power "who have committed the same acts."[40] It is difficult to conceive that any State has laws punishing members of its own armed forces for the violation of a parole given as a prisoner of war, particularly when so many States have laws or regulations prohibiting members of their armed forces from giving or accepting parole when prisoners of war.[41] Inevitably, some States are bound to find themselves altogether unable to punish prisoners of war captured while acting in violation of a valid parole;[42] or will have to solve this problem by using an analogy of doubtful validity.[43]

[37] Spaight, *Air Power* 392. However, it should be noted that the freeing of prisoners of war by the Detaining Power upon conditions that the prisoners of war are not given an opportunity to accept or reject is not binding on them as a parole. Flory, *Prisoners of War* 129; *Lieber Code*, Article 128. For an incident at Singapore involving the coercion of a promise not to escape from thousands of British and Australian prisoners of war by the Japanese during World War II, *see* Bergamini, *Japan's Imperial Conspiracy* 966. (This incident is also referred to at *I.M.T.F.E.* 1084.)

[38] Gutteridge, The Geneva Conventions of 1949, 26 *B.Y.I.L.* 294, 315; *U.S. Manual*, para. 185b.

[39] *Lieber Code*, Article 124(1); *Code de justice militaire français*, Article 235. *See* note 20 *supra*.

[40] *See* p. 322 *supra*.

[41] *See* note 34 *supra*.

[42] It is extremely doubtful that any belligerent will accept this alternative.

[43] The United States Army apparently intends to analogize the violation of parole by a prisoner of war to the violation of the parole granted to a member of its armed forces serving a sentence of imprisonment after conviction of the commission of a crime. *U.S. Manual*, para. 185b. This means that the maximum punishment will be confinement at hard labor for six months (*Manual for Courts-Martial*, para. 127c, Table of Maximum Punishments, Article 134; JAGW 1957/3367, 25 April 1957), scarcely a very severe penalty for an offense which previously could have resulted in the death penalty.

4. Escape

Since time immemorial individuals captured in war have attempted to escape from the custody of their captors and to return to the control of their own forces.[44] Man's nature has not changed, and escape is still very much present in the minds of most captives; in fact, many individuals and States consider it to be a duty.[45] The draftsmen of the 1949 Convention appreciated this phenomenon, and included within its provisions a number relating to escape and to attempted escape, some of which are merely edited versions of provisions of the 1929 Convention, but some of which are new, arising out of the experiences of World War II. These provisions fall into two categories: (1) those relating to successful escapes; and (2) those relating to unsuccessful attempts to escape.

As a preliminary to the discussion of these provisions, it must be borne in mind that while the possibility of escape is usually in the thoughts of every prisoner of war, so is the need to take all possible precautions to prevent escapes very much in the thoughts of officials of the Detaining Power.[46] The prisoners of war will, of course, be confined to prisoner-of-war enclosures which will be made as "escape-proof" as humanly possible and which will be under the watch of armed guards. Because of the frequently unjustifiable fatal use of arms against prisoners of war during World War II, a new provision has been included in the 1949 Convention as Article 42. It specifies that the use of weapons against prisoners of war, "especially against those who are escaping or attempting to escape," constitutes an extreme measure which must be preceded by appropriate warnings.[47] Should a guard unjustifiably shoot and kill or seriously wound a pris-

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[44] *See, e.g.*, Reid, *The Colditz Story* and *Men of Colditz*, relating the story of the many escapes and attempted escapes from an "escape-proof" German prisoner-of-war camp during World War II. For some data on prisoner-of-war escapes and attempted escapes in the United States during World War II, see Rich, Brief History 479; *PMG Review*, III at 221–22.

[45] Davis, Prisoner of War 538; *Code of Conduct*, Article III; Rich, Brief History 478; Lyons, Code of Conduct 76; Phillimore, Suggestions 30; Spaight, *Air Power* 369.

[46] Walzer, Prisoners of War 783.

[47] This provision is substantially a codification of prior customary international law. *See* the *Drierwalde Case* at 86; and the *Trial of Richard Bruns. See also POW Circular No. 1*, para. 113. *But see German Regulations*, No. 29, para. 462, which admonished German prisoner-of-war guards that "it is better to fire too soon than too late"; and *ibid.*, No. 32, para. 504, which stated that no warning shots were required and that should a prisoner-of-war guard find it necessary to use weapons, "they must be fired with the intent to hit." *See also I.M.T.* 472. For a directive implementing Article 42, see U.S. Army Regs. 633–50, para. 93. For a discussion of the application of Article 42 in cases of prisoner-of-war mutinies, *see* pp. 316–317 *supra.*

oner of war, he would be chargeable with a violation of Article 130.[48]

The Convention now lists three situations in which an escape is deemed to have been successful. These three situations, set forth in the first paragraph of Article 91, are as follows:

a. When the escapee has succeeded in rejoining his own armed forces or the armed forces of an ally of his Power of Origin;

b. When the escapee has succeeded in leaving territory which is under the control of the Detaining Power or of an ally of the Detaining Power;[49] and

c. When the escapee has succeeded in reaching a ship flying the flag of his own Power of Origin, or of an ally, in the territorial waters, but not under the control, of the Detaining Power.[50]

The common thread in these three situations is that the prisoner of war is no longer within the power, or in territory under the control, of the Detaining Power.[51] If he has reached the armed forces of his own Power of Origin or of an ally, or the territory of his own Power of Origin or of an ally, or enemy territory occupied by friendly troops, or a vessel flying the flag of his own Power of Origin or of an ally, he will once more come under the control of his own armed forces and no international legal problems arise. However, if his successful

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[48] *See* pp. 353–355 and 360–361 *supra*. Moreover, the Detaining Power is obligated to investigate and report on such incidents and, if appropriate, to institute prosecutions. *See* the discussion of Article 121 at p. 397 *supra*. There is no evidence that India complied with these requirements when a number of Pakistani prisoners of war were shot and killed by guards in 1972. ICRC *Annual Report*, 1972 at 48–49; *ibid.*, 1973 at 20. Benjamin, Tension Rising in Indian POW Camps, *Washington Post*, 23 December 1972 at A16, cols. 1–4.

[49] In other words, if he has reached territory under friendly or neutral control. The 1947 Conference of Government Experts had recommended that this type of successful escape be defined as occurring "on reaching neutral or non-belligerent territory, or territory not occupied, but under the authority of their own country or of an ally." 1947 GE Report 211. (The meaning of the term "territory not occupied" is not exactly clear. Suppose that the escapee reached enemy territory occupied by the armed forces of his Power of Origin or an ally; that would certainly constitute a successful escape.)

[50] The 1947 Conference of Government Experts had recommended a provision specifying as a successful escape the reaching of the high seas, followed by the provision set forth in the text. *Ibid.*, 212. The ICRC dropped the high-seas provisions when it prepared the Stockholm draft, stating that it was unnecessary, as the situation was covered by the successful escape defined in "b" in the text hereof. *Draft Revised Conventions* 109. However, Pictet, *Commentary* 447 n.2, gives a different reason for the change.

[51] He might still be within the territory of the Detaining Power—but in territory occupied by his Power of Origin or an ally. *See* note 49 *supra*. In Flory, *Prisoners of War* 157, the statement is made that an escaping prisoner of war remains such "until he is no longer on the territory controlled by the detaining state although this doctrine is not universally recognized or approved." The provisions of the first paragraph of Article 91 should remove the uncertainty mentioned by Flory.

escape is based upon his reaching neutral or nonbelligerent territory (even if the nonbelligerent favors the fortunes of the former Detaining Power), the status of the successful escapee is then governed by the first paragraph of Article 13 of the Fifth Hague Convention of 1907.[52] He must be left at liberty and he may return to his Power of Origin or to an ally if this is physically possible.[53] If he remains in the asylum States, he may be given an assigned place of residence;[54] but that State may not prevent him from leaving its territory whenever he decides to do so.[55]

The reaction of the Detaining Power to prisoner-of-war escapes and attempted escapes is the subject matter of quite a few limitations. With respect to successful escapes, the 1949 Convention contains two provisions, both of which are edited versions of comparable provisions of the 1929 Convention. The second paragraph of Article 91 provides that a prisoner of war who has made a successful escape, as defined in the first paragraph of that Article, and who is thereafter recaptured, may not be punished for his prior act of escape.[56] And the last paragraph of Article 93 limits the punishment which may be imposed on other prisoners of war who assisted the success-

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[52] *See* pp. 68–70 *supra*. *See generally* Wilson, Escaped Prisoners of War in Neutral Jurisdiction, 35 *A.J.I.L.* 519. A neutral State may, of course, deny the escaped prisoner of war entrance to its territory. Sauser-Hall, Des belligérents internés 108; Castrén 467; *but see* Montaudon, Des internés 43. While this is undoubtedly within its sovereign prerogative, it would be unusual for a State to take such action during the course of hostilities, although not so after their termination. *See* note I-265 *supra*.

[53] 1 ICRC *Report* 564; Sauser-Hall, Des belligérents internés 106. In Flory, Vers une nouvelle conception 61, the author seems to have completely confused successful escapees who enter neutral territory, whose status is governed by the first paragraph of Article 13 of the 1907 *Hague Convention No. V*, with still uncaptured members of a belligerent armed force who seek asylum in neutral territory in order to avoid capture, a situation governed by the first paragraph of Article 11 of that 1907 Convention.

[54] 1 ICRC *Report* 564; Martin, Note 66 & 68; Mason, *Prisoners of War* 434–37.

[55] Sauser-Hall, Des belligérents internés 263; Martin, Note 66; Mason, *Prisoners of War* 434–37.

[56] *See* note 62 *infra*. A similar provision had appeared in the second paragraph of Article 50 of the 1929 Convention and, prior to that, in the third paragraph of Article 8 of the 1907 Hague Regulations. (Article 31 of those Regulations had a similar "home-free" provision with respect to spies.) *See also Lieber Code*, Article 78. In Miller, *The Law of War* 247–48, Professor Cohen states that "[t]he Chinese probably regard the Convention's provisions restricting punishment for escape as bizarre and based on a 'sporting' view of escape," and that "[t]hey should not find it easy to understand why Article 91 prohibits them from punishing a prisoner of war for the escape if he is recaptured after making good his escape." Grady, Evolution 182, takes a position somewhat similar to that ascribed to the Chinese.

ful escapee to that of a disciplinary nature.[57] With respect to prisoner-of-war escape attempts which prove unsuccessful, the limitations on the reaction of the Detaining Power are more numerous. The recalcitrant prisoner of war may be given only disciplinary punishment,[58] even if he is a recidivist (Article 92, first paragraph);[59] if he is beyond the confines of the prisoner-of-war camp when he is recaptured, he must be returned immediately to military custody (Article 92, second paragraph);[60] his Power of Origin must be notified of his recapture, through the Information Bureaux and the Central Agency, if it has been notified of his escape (Article 94); the fact of the attempted escape may not be considered an aggravating circumstance if the unsuccessful escapee is tried for an offense committed during his attempt to escape (Article 93, first paragraph); offenses not involving violence against life or limb committed during the course and in furtherance of the attempt to escape[61] may subject the prisoner of war to disciplinary punishment only (Article 93, sec-

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[57] This was formerly contained in the second paragraph of Article 51 of the 1929 Convention. It had no counterpart in the 1907 Hague Regulations. Concerning "disciplinary punishment," *see* pp. 324–330 *supra*. It should be borne in mind that the protection afforded to aiders and abettors under the last paragraph of Article 93 is applicable to prisoners of war only. Other persons, such as nationals of the Detaining Power, or of the Power of Origin who are in the territory of the Detaining Power, who assist a prisoner of war to escape or to attempt to escape, are subject to the laws of the territorial sovereign. *See, e.g.*, Prisoners of war or enemy aliens, 18 *U.S.C.* §757.

[58] This was the policy adopted in many of the various bilateral agreements entered into during World War I. *See, e.g.*, §16(a), *Agreement between Great Britain and Germany* (July 1917); Article XVIII(a), *Agreement between the British and Turkish Governments* (December 1917); and Article 83, *Agreement between the United States of America and Germany* (November 1918). It was thereafter included in the first paragraph of Article 50 of the 1929 Convention.

[59] The unsuccessful prisoner-of-war escapee may, under the last paragraph of Article 92, be subjected to "special surveillance." However, the "special surveillance" must not be of such a character as to (1) affect his health; (2) remove him from a prisoner-of-war camp; or (3) suppress any of his rights under the Convention. In direct violation of both the first and last paragraphs of Article 92, in Korea the Chinese imposed lengthy sentences to solitary confinement as a punishment for attempted escapes. Miller, *The Law of War* 248. The Japanese had acted even more savagely during World War II. *I.M.T.F.E.* 1084 & 1091; Bergamini, *Japan's Imperial Conspiracy* 966 & 969.

[60] During World War II unsuccessful escapees in Germany were frequently turned over to the Gestapo or sent to concentration camps. *See The Stalag Luft III Case. See also I.M.T.* 472.

[61] This provision is designed to ensure a reversal of the policy followed in many countries during World War II of holding prisoners of war criminally responsible for even nonviolent crimes committed during, and to facilitate, an escape attempt (Canada: *Rex v. Kaehler and Stolski; Rex v. Schindler; Rex v. Brosig* (contra, *Rex v. Krebs*); United States: *U.S. v. Farina; PMG Review*, III at 224; *see also* SPJGW 1944/139, 31 January 1944; Germany: *German Regulations*, No. 23, para. 308.) Article 93, second paragraph, specifically exempts the escaping prisoner of

ond paragraph);[62] and other prisoners of war who assisted the unsuccessful escapee may, as in the case where they assisted a successful escapee, be given disciplinary punishment only (Article 93, third paragraph).[63]

From the foregoing it is fairly obvious that in drafting the Convention in 1949, the members of the Diplomatic Conference had little doubt but that attempts by prisoners of war to escape, some of which would be successful and some of which would be unsuccessful, would occur in any armed conflict in which States party to the Convention might thereafter be involved.

5. Repatriation or Accommodation in a Neutral Country During the Course of Hostilities

a. WOUNDED AND SICK PRISONERS OF WAR

(1) Repatriation

The basic policy concerning the repatriation of seriously wounded and seriously sick prisoners of war during the course of hostilities is set forth in the first paragraph of Article 109 which provides, in peremptory terms, that "Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war." Unfortunately, as we shall see, belligerents in World War II did not regard a very similar provision of the 1929 Convention as being peremptory in character, and there is no reason to believe that the participants in the 1949 Diplomatic Conference desired or intended that the quoted provision should really be considered as mandatory—despite the appearance of its wording.

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war from criminal liability for nonviolent offenses "such as offences against public property, theft without intention of self-enrichment, the drawing up or use of false papers, [or] the wearing of civilian clothes" committed solely in furtherance of the attempt to escape. *See* Rich, Brief History 466. (The quoted list is exemplary only, and does not purport to be all-inclusive.)

[62] If an escaping prisoner of war steals a vehicle in order to facilitate his escape and is recaptured before effectuating the escape, under the second paragraph of Article 93 he is subject to disciplinary punishment only. If his escape is successful but he subsequently again becomes a prisoner of war, the provisions of the second paragraph of Article 91 would be applicable to his case and he would not be subject to any punishment. If an escaping prisoner of war kills a guard in the course of his escape and is recaptured before effectuating the escape, the second paragraph of Article 93 offers him no protection and the Detaining Power may try him for the homicide. *See* Spaight, *Air Power* 368–69. If his escape is successful but he subsequently again becomes a prisoner of war, the provision of the second paragraph of Article 91 that he "shall not be liable to any punishment *in respect of* [*his*] *previous escape*" (emphasis added), would seem to protect him even from a homicide prosecution. *But see* Pictet, *Commentary* 454.

[63] In Article 77, second paragraph, of the *Lieber Code*, it was provided that participants in a conspiracy for a "united or general escape" could be punished with death. The last paragraph of Article 93 draws no distinction between single escapes and mass escapes.

The 1907 Hague Regulations contained no provisions covering the subject of the repatriation of seriously wounded or seriously sick prisoners of war during the course of the hostilities. When, during World War I, the several belligerents were ultimately convinced that such repatriation, or, alternatively, internment in a neutral country, would be in the best interests of all concerned, it was necessary for them to develop the appropriate procedures and to include them in agreements entered into for that purpose. The procedure so adopted was generally to list the specific physical and mental conditions which would warrant repatriation or internment in a neutral country.[64] The practice was thereafter included in the first paragraph of Article 68 of the 1929 Convention. Under its provisions belligerents were "required" to repatriate "seriously ill or seriously wounded" prisoners of war as soon as they were in a condition to travel and regardless of "rank and numbers."[65] Article 68, in its second paragraph, provided that the Parties should enter into agreements covering the conditions that would warrant repatriation and those that would warrant internment in a neutral country. Thus, although the first paragraph of Article 68, dealing with repatriation, appeared to be self-executing, the succeeding paragraph of that Article made it quite clear that accords between the belligerents were necessary in order to implement even the provision for repatriation.[66] While the second paragraph of Article 68 also provided for the use of the Model Agreement annexed to the 1929 Convention until such an accord had been successfully negotiated, it is scarcely surprising that in no instance was this automatic procedure followed during World War II. However, many of the belligerents did reach mutual agreements to apply the provisions of the Model Agreement, and a number of exchanges of seriously sick and seriously injured prisoners of war were effected.[67]

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[64] Murphy, Repatriation 7. *See, e.g.*, the *Agreement between the British and German Governments concerning Combatant Prisoners of War and Civilians* (July 1918).

[65] The first negotiations during World War II between Great Britain and Germany for an agreement to implement the first two paragraphs of Article 68 of the 1929 Convention collapsed when, because the figures favored the British, the Germans demanded that the exchange be on a head-for-head basis. 1 ICRC *Report* 374–75; Maughan, *Tobruk* 771. As a result, no medical repatriations between Great Britain and Germany took place until October 1943, more than four years after the initiation of hostilities. *Ibid.*, 801; Janner, *Puissance protectrice* 58–59.

[66] Meitani, Régime 191. While there would be considerably less delay if the repatriations were conducted on a unilateral basis, this is probably not feasible, not only because of the logistics problems, but also because of situations such as arose in Vietnam when South Vietnam attempted to repatriate some seriously wounded and seriously sick prisoners of war and North Vietnam refused to accept them. *See* p. 410 *infra*.

[67] *See* note 65 *supra*; 1 ICRC *Report* 373–93; 1942 *Exchange of Notes between the United States and Germany;* 1942 *Agreement between the United States and*

With this fairly successful experience of World War II fresh in their minds, the draftsmen of the 1949 Convention continued the relevant provisions of the 1929 Convention, somewhat edited and somewhat amplified, but no more mandatory, in the 1949 Convention. As quoted at the beginning of this section, under the first paragraph of Article 109 the Parties are once again "bound" to repatriate seriously wounded[68] and seriously sick prisoners of war, regardless of number or rank, as soon as they are able to travel.[69] Repatriation is to be in accordance with the provisions of the first paragraph of Article 110, which lists the three categories of seriously wounded and seriously sick prisoners of war who are to be repatriated.[70]

Subsequent to 1949 a number of occasions arose warranting the implementation of the provisions of the first paragraph of Article 109. In February 1953 the United Nations Command in Korea proposed the exchange of seriously wounded and seriously sick prisoners of war pursuant to that Article, a proposal which the North Koreans and Chinese Communists accepted.[71] During April and May 1953,

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Italy; Rubli, Repatriation 623–24; Murphy, Repatriation 12–14, 1971 Hearings 482–83; Maughan, *Tobruk* 805–08; Stuart, Special War Problems Division, 11 *Dept. State Bull.* 63, 73; Tollefson, Enemy Prisoners of War 74, nn.26 & 27; *PMG Review*, III, at 109. However, Japan adamantly refused to participate in a program of medical repatriation. Janner, *Puissance protectrice* 59.

[68] The French versions of both Conventions (1929 and 1949) use the term "*grands blessés.*" While some of the English versions of the first paragraph of Article 68 of the 1929 Convention used the term "seriously injured," that of the first paragraph of Article 109 of the 1949 Convention uses the term "seriously wounded." This change in the first paragraph of Draft Article 100 (now Article 109) originated in the Drafting Committee of the 1949 Diplomatic Conference. 2B *Final Record* 182. "Injured" was probably a better choice of words as a wound is certainly an injury, but an injury is not necessarily a wound; and Article 114 specifies that prisoners of war who suffer non-self-inflicted *injuries* (perhaps in an industrial accident suffered while working as a prisoner of war) fall within the group of those eligible for medical repatriation (or accommodation in a neutral country).

[69] While the last paragraph of Article 68 of the 1929 Convention referred to agreements for "direct repatriation," as well as for accommodation in a neutral country, the second paragraph of Article 109 refers only to the latter type of agreement with respect to sick and wounded prisoners of war. Belligerents would, however, be authorized to enter into an agreement for direct repatriation, in implementation of the first paragraph of Article 109, pursuant to the provisions of the first paragraph of Article 6, as such an agreement would, in the vast majority of cases, not "adversely affect the situation of the prisoner of war," nor would it in any way restrict the rights which the Convention confers upon them. *But see* note 77 *infra*.

[70] Article 110, first paragraph, lists broad classifications while Part IA of Annex I, the Model Agreement, goes into the specifics. (One of the specifics is that the prognosis is against recovery within a period of one year.)

[71] *Notes on Exchange of Wounded Prisoners* [*of War*] *in Korea*, 22 February 1953 & 28 March 1953. These notes resulted in the *Agreement on Repatriation of Sick and Wounded Prisoners* [*of War*] 11 April 1953), known as "Little Switch."

some 6,640 North Korean and Chinese prisoners of war who had been found to be seriously wounded or seriously sick within the meaning of those terms as used in the Convention were exchanged for 684 members of the armed forces composing the United Nations Command.[72] During the 1956 Middle East conflict, Israel repatriated a number of seriously wounded Egyptian prisoners of war in the course of the hostilities.[73] During the 1962 Sino-Indian conflict, the People's Republic of China repatriated a number of seriously wounded or seriously sick Indian prisoners of war.[74] And, finally, in 1970, during the hostilities in Vietnam, the General Assembly of the United Nations adopted a resolution urging compliance with the provisions of the first paragraph of Article 109.[75] The South Vietnamese had already identified over 800 North Vietnamese prisoners of war who fell within the provisions of the lead paragraphs of Articles 109 and 110 and Annex I.[76] Despite the fact that the South Vietnamese authorities must have known that many of these men did not desire repatriation, in April 1971 those authorities unilaterally announced a proposed repatriation of 660 seriously wounded and seriously sick prisoners of war held by them. The offer was accepted by the North Vietnamese. When interviewed by the representatives of the ICRC in South Vietnam, all but 13 of the prisoners of war exercised their right to decline repatriation during hostilities.[77] On 2 June 1971 the 13 were taken by ship to a point off the coast of North Vietnam, but by that time the North Vietnamese had broadcast a statement rejecting their repatriation.[78]

It is obvious that the repatriation of seriously wounded and seriously sick prisoners of war during the course of hostilities is now well established in the law of war and is generally acceptable to

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[72] U.S., MP Board, Korea, 11, at 424. *See also* Rubli, Repatriation 624.

[73] For some instances of individual unilateral repatriations, *see* ICRC *Annual Report*, 1971, at 40–42.

[74] Miller, *The Law of War* 249.

[75] U.N., G.A. Res. 2676, 9 December 1970, 25 U.N. GAOR Supp. 28 at 77, U.N. Doc. A/8028 (1971).

[76] *Vietnam, Article-by-Article Review*, Article 109.

[77] The last paragraph of Article 109 prohibits the involuntary repatriation of seriously wounded and seriously sick prisoners of war during the course of hostilities. (This should not be confused with the problem of voluntary versus involuntary repatriation after the cessation of hostilities as some writers have done. *See, e.g.*, Rabli, Repatriation 628. With respect to this problem in connection with post-hostilities repatriation, *see* pp. 421–426 *infra*.)

[78] ICRC *Annual Report*, 1971, at 30–32; Sullivan, Prisoners of War in Indochina 305. Murphy, Repatriation 23–24. From the sequence of events, there seems little doubt but that this whole affair was a not very successful propaganda ploy by the South Vietnamese.

States.[79] The opposing belligerents can, by agreement, establish any administrative procedures that they may desire. However, as we have just seen, experience indicates that they will most probably agree to avail themselves of the procedures established by the Convention and its Annexes.[80] This means that prisoners of war who are found to be within the categories enumerated in the first paragraph of Article 110 and to have any of the specific conditions listed in Annex I, Part IA, will be entitled to repatriation. The determination of eligibility in each individual case may be made in either of two ways. The second paragraph of Article 112 provides for the repatriation of prisoners of war who are determined by the medical authorities of the Detaining Power to be manifestly seriously wounded or seriously sick within the meaning of those terms as used in the Convention. Such individuals will be repatriated without further administrative proceedings. But this will affect only a relatively small percentage of the prisoners of war who are believed by the retained medical personnel, by the prisoners' representative, or by the prisoners of war themselves to be entitled to medical repatriation. With regard to these, the determination of entitlement to repatriation will be made by Mixed Medical Commissions. These Commissions, the existence of which is recognized in last paragraph of Article 110 and the first paragraph of Article 112, are established in accordance with, and function under, Annex II to the Convention. They consist of three medically qualified persons, of whom one is appointed by the Detaining Power and the other two (who must be nationals of neutral States) are "appointed by the International Committee of the Red Cross, acting in agreement with the Protecting Power, at the request of the Detaining Power."[81] They function by majority vote,[82] and their decisions must be carried out by the Detaining Power within three months of the receipt by it of notice thereof.[83]

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[79] This type of repatriation is, on the whole, in the self-interest of the Detaining Power whom it relieves of a major logistics problem, transferring it to the enemy, the Power of Origin of the repatriated prisoners of war. Those prisoners of war who fall within the ambit of the first paragraph of Article 110 and Annex I, Part IA, will add little, if anything, to the warmaking potential of the Power of Origin and will considerably increase its medical requirements. Nevertheless, it must be assumed that, in practically every case, a Power of Origin will be willing to have, and be desirous of having, repatriated the seriously wounded and seriously sick members of its armed forces, who had been captured by the enemy.

[80] The last paragraph of Article 110 provides that, absent an agreement between the Parties, the provisions of Annexes I and II will govern.

[81] Annex II, Article 2.

[82] *Ibid.*, Article 10.

[83] *Ibid.*, Article 12. A form of "Repatriation Certificate" to be issued to prisoners of war found by the Mixed Medical Commissions to be repatriable is set forth in Annex IVE of the Convention.

There are several methods specified in the 1949 Convention by which a prisoner of war may be entitled to appear before a Mixed Commission for a physical evaluation to determine whether he falls within one of the repatriable categories listed in the first paragraph of Article 109 as amplified in Annex I, Part IA. The first paragraph of Article 113 provides that designations for appearances before Mixed Medical Commissions may be made by (1) retained medical personnel who are nationals of the Power of Origin of the prisoner of war or of an ally of that Power; (2) by the prisoners' representative; or (3) by the Power of Origin itself or by an organization recognized by it and giving assistance to prisoners of war.[84] Moreover, the second paragraph of Article 113 authorizes any prisoner of war who considers himself medically entitled to repatriation and who has not been proposed by any of the foregoing authorities to present himself on his own initiative to the Mixed Medical Commission.[85]

The Convention includes a number of miscellaneous provisions relating to medical repatriations during the course of hostilities. Some of these have been mentioned in passing but warrant repetition. Thus, the last paragraph of Article 109 provides that this type of repatriation must be completely voluntary, that no "sick or injured"[86] prisoner of war may be repatriated during the course of hostilities against his will;[87] the last paragraph of Article 113 entitles the prisoner of war being examined by a Mixed Medical Commission to have the support of the presence of a retained medical man of his own nationality as well as of the prisoners' representative;[88] Article 114 specifies that a prisoner of war who sustains a nonself-inflicted injury in an accident is eligible for medical repatriation;[89] the first paragraph of

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[84] This provision is based upon Article 70 of the 1929 Convention as edited by the ICRC (Revised Draft Conventions 92–93) and by the 1949 Diplomatic Conference (2B *Final Record* 182). Nowhere in the legislative history, nor in the Convention, is there indication as to whether the organization referred to is that mentioned in the third paragraph of Article 10, or the first paragraph of 125 or elsewhere. *See* pp. 312–314 *supra.*

[85] If he does so, he "shall be examined only after those" officially proposed. Article 113, second paragraph. In other words, he goes to the end of the line.

[86] The Drafting Committee of the 1949 Diplomatic Conference failed to make the language of this provision of the third paragraph of Draft Article 100 (now the last paragraph of Article 109) coincide with the language of the first paragraph of Draft Articles 100 (now Article 109) and 103 (now Article 113) when the latter were changed. *See* 2B *Final Record* 182, and note 68 *supra.*

[87] *See* note 77 *supra.* A proposal made by the United Kingdom to send such prisoners of war to internment in a neutral country was rejected by Committee II of the 1949 Diplomatic Conference. 2A *Final Record* 291, 373, & 391.

[88] The prisoners' representative will, of course, also be of the same nationality as the prisoner of war. *See* pp. 298–199 *supra.*

[89] *See* note 68 *supra.*

Article 115 removes the prior imposition of disciplinary punishment[90] as a basis for denying medical repatriation, while its second paragraph makes a prisoner of war against whom a judicial prosecution[91] is pending, or against whom a conviction in such a proceeding has been obtained, ineligible for repatriation until the completion of the proceedings and the sentence, if any, except with the consent of the Detaining Power; and Article 117 prohibits the employment "on active military service" of any repatriated "person."[92]

Repatriation of seriously wounded and seriously sick prisoners of war during the course of hostilities, despite all the problems which it presents and creates, is a humanitarian procedure of incalculable benefit to the prisoner of war so repatriated without adversely affecting the Detaining Power that permits his repatriation. It has operated with some difficulty, but, on the whole, successfully, and should unquestionably be resorted to by the belligerents in any future international armed conflict.

(2) Accommodation in a Neutral Country

During World War I some belligerents were reluctant to repatriate even seriously sick and seriously injured prisoners of war lest this increase the warmaking potential of the enemy.[93] As a result, in addition to the repatriation of such prisoners of war, another humanitarian procedure evolved during the course of that conflict—the accommodation (internment) in a neutral country of prisoners of war who, although not so seriously sick or seriously injured as to be totally incapacitated and, therefore, repatriable, were still so nearly within that category, and had been prisoners of war for such long periods,[94] as to warrant some special consideration. The solution reached consisted of trilateral agreements under which a neutral Power agreed to accommodate them within its territory for the duration of the hos-

[90] Concerning disciplinary punishment, *see* pp. 324–330 *supra*.

[91] Concerning judicial prosecution and punishment, *see* pp. 330–342 *supra*. The last paragraph of Article 115 requires each Detaining Power to advise the Power of Origin of the names of prisoners of war selected for medical repatriation who are so detained.

[92] The physical position of this provision in the Convention makes it obvious that it relates only to repatriations under Articles 109–16. *See U.S. Manual*, para. 196(b). The precise perimeters of the provision are far from clear. *See* Levie, Repatriation 695 n.12 and 705–06; Diplomatic Conference Documents, Memorandum by Finland, Document No. 9 at 3; Prugh, Code of Conduct 704–05; ICRC, *Information Note No. 4* at 6–13.

[93] In Lindsay, *Swiss Internment* 3, the following appears: "The fear expressed by France [in February 1915] that under the system of exchange wounded soldiers would be returned to Germany who could still be of military service [an amputee could work in a depot, thus relieving an able-bodied soldier], was common to other belligerents."

[94] Many prisoners of war wounded and captured early in World War I developed a "barbed-wire" psychosis that was disabling in and of itself. Flory, *Prisoners of War* 97.

tilities so as to enable them to have medical treatment and surroundings that would contribute to the improvement of their physical and mental conditions and that, understandably, would rarely be available to them in a prisoner-of-war camp or hospital.[95]

Many thousands of prisoners of war on both sides were satisfactorily accommodated in neutral countries during World War I pursuant to agreements of this nature.[96] Based upon this experience, specific provisions covering the accommodation (internment) of seriously sick and seriously injured prisoners of war in neutral countries during the continuation of hostilities were included in Articles 68–73 of the 1929 Convention.[97] Much of what has been said with respect to the procedure for the selection of seriously sick and seriously injured prisoners of war for repatriation was to be equally applicable to their selection for accommodation in a neutral country. The Mixed Medical Commissions were to operate in the same manner; and the prisoners of war examined by them would, in appropriate cases, be selected either for repatriation (if they were found to be within Part IA or IIA of the Model Agreement annexed to the 1929 Convention) or for accommodation in a neutral country (if they were found to be within Part IB or IIB of the Model Agreement).

Despite this historical background, the accommodation of seriously sick or seriously injured prisoners of war in neutral countries did not occur at all during World War II. A general ICRC proposal for such a procedure, based upon Switzerland's declared willingness to accept such prisoners of war for medical internment, was originally accepted by the British, French, and German Governments; but be-

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[95] The suggestion for accommodation (internment) in a neutral country was originally made by the Swiss Federal Council. It was elaborated upon by the Pope in 1916 and was accepted by the belligerents, and was thereafter implemented by France, Germany, and Great Britain. Lindsay, *Swiss Internment* 2–7. Subsequently, the Netherlands agreed to serve as a place of accommodation for the prisoners of war selected by Germany and Great Britain for such purpose. *Agreement between Great Britain and Germany* (2 July 1917).

[96] *See* note 95 *supra*. One potential problem raised by Switzerland concerned the possibility of the escape to their own countries of prisoners of war accommodated in that neutral country. This was solved by including in the agreements a provision that each belligerent would send back to Switzerland any members of its armed forces who escaped from internment in that country. Lindsay, *Swiss Internment* 5; Hauser, L'internement en Suisse des prisonniers de guerre malades ou blessés 514–15.

[97] The matter is also governed by Article 14 of the Fifth Hague Convention of 1907. It must be borne in mind that the provisions referred to in the text and in this note relate only to prisoners of war who arrive in the neutral country as a result of an agreement between the belligerents and the neutral country. They do not apply to prisoners of war brought into neutral territory by enemy troops seeking transit through or refuge in the neutral country (*ibid.*, second paragraph of Article 13; Castrén 468) or who have escaped from enemy custody and entered the neutral territory of their own volition during the course of their escape (*see* pp. 404–405. *supra*).

fore it was implemented the German Government proposed to France and Great Britain that prisoners of war found to be medically entitled to accommodation in a neutral country be repatriated instead. This proposal was accepted and repatriation, rather than accommodation in a neutral country, was the procedure followed by those countries throughout World War II.[98] The Mixed Medical Commissions functioned in the prescribed manner,[99] but all prisoners of war found to be seriously sick or seriously injured within the scope of the Model Agreement were repatriated.

Notwithstanding the decision of the belligerents of World War II not to avail themselves of the provisions of the 1929 Convention relating to the accommodation of seriously sick and seriously injured prisoners of war in a neutral country during the course of hostilities, the draftsmen of the 1949 Convention deemed it advisable to continue to provide for such a procedure. The second paragraph of Article 109 affirmatively establishes the procedure; the second paragraph of Article 110 enumerates the general categories of prisoners of war eligible for such accommodation in a neutral country, and Part IB of the Model Agreement annexed to the 1949 Convention lists the specific conditions that fall within those categories; Article 111 encourages the Detaining Power and the Power of Origin, and a neutral Power acceptable to both of them, to enter into an agreement covering the subject; while the administrative procedures already mentioned in the discussion of the selection of seriously wounded and seriously sick prisoners of war for repatriation[100] are equally applicable in the selection of seriously wounded and seriously sick prisoners of war for accommodation in a neutral country. There is, moreover, as there was in the 1929 Convention, a provision for the repatriation, upon the occurrence of specified medical eventualities, of prisoners of war previously accommodated in a neutral country[101]

In the few instances since 1949 in which these provisions of the 1949 Convention have been relevant, the belligerents concerned have once again repatriated seriously wounded and seriously sick prisoners of war, apparently without giving much consideration to the possi-

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[98] 1 ICRC *Report* 382–85. When the United States became a belligerent in World War II it, too, expressed a preference for the repatriation, rather than internment in a neutral country, of prisoners of war whose physical or mental condition brought them within category "B" of the Model Agreement attached to the 1929 Convention. *Ibid.*, 385; Rich, Brief History 503–04.

[99] *See, e.g., ibid.*, 500–01; *German Regulations*, No. 28, para. 415; *ibid.*, No. 34, para 624; Hoole, *And Still We Conquer* 51.

[100] *See* pp. 410–413 *supra.*

[101] *See* Article 110, third paragraph. For some reason it was not considered necessary in either 1929 or 1949 to include in the convention being drafted a specific provision for the repatriation of the interned prisoners of war upon the cessation of active hostilities.

bility of accommodation in a neutral country.[102] Should the belligerents in any future international armed conflict again elect to repatriate all seriously wounded and seriously sick prisoners of war falling within the purview of both the first and second paragraphs of Article 110 and of both Parts IA and IB of the Model Agreement, there certainly could not be any objection to such a decision.[103] Inasmuch as the reasons for reaching that decision during World War II[104] will always be present in any international armed conflict, it is highly likely that the belligerents will continue to opt for repatriation for those prisoners of war who are technically eligible only for accommodation in a neutral country. Nevertheless, it was appropriate to include the provisions in the Convention, as there may well be a return to the position taken during World War I that even a completely disabled prisoner of war may, if repatriated, contribute to the enemy's warmaking potential.[105]

b. OTHER PRISONERS OF WAR

Article 72 of the 1929 Convention provided that belligerents "may conclude agreements" for the repatriation or hospitalization in a neutral country of prisoners of war who, although able-bodied, "have undergone a long period of capitivity."[106] It does not appear that any belligerents availed themselves of this provision during World War II.[107] Nevertheless, once again the draftsmen of the 1949 Convention elected to include a potentially humanitarian provision in the new

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[102] *See, e.g.*, ICRC *Annual Report*, 1972 at 51 (India-Pakistan); *ibid.*, 1973 at 5–6 (Egypt-Israel) and 20–21 (India-Pakistan).

[103] This procedure was unquestionably fully acceptable to the prisoners of war concerned during World War II, would normally be acceptable to any prisoner of war offered the choice between repatriation and internment in a neutral country, and would not be in violation of the first paragraph of Article 6 of the 1949 Convention. However, it must include compliance with the provision of the last paragraph of Article 109. *See* note 77 *supra*.

[104] The reasons given by Germany for making its proposal, early in World War II, to substitute repatriation for internment in a neutral country (*see* pp. 414–415 *supra*), were that it was preferable for the disabled prisoners of war to be treated in their own country; and that it would save the Power of Origin a heavy charge on its available foreign exchange. 1 ICRC *Report* 383. (Article 116 provides that the Power of Origin must bear all of the expenses of repatriation of prisoners of war "or of transporting them to a neutral country." Presumably, this includes the expenses of maintaining them, usually in a hospital, in the neutral country.)

[105] *See* note 93 *supra*.

[106] There is no indication as to what is considered to be "a long period of captivity." One author believes that a prisoner of war should be repatriated under this provision after 18 months of captivity. Havens, Release and Repatriation of Vietnam Prisoners, 57 *A.B.A.J.* 41, 44. During World War II and the hostilities in Vietnam, some individuals were prisoners of war for periods in excess of 5 years.

[107] Murphy, Prisoners of War 15 (1971 Hearings at 483) says the the belligerents "could not agree on the question of [the repatriation of] prisoners [of war] who had been subject to a long period of captivity."

agreement, despite the fact that its predecessor had remained unused during what was probably the longest international armed conflict of the past century.[108] The final sentence of the second paragraph of Article 109 of the 1949 Convention is almost identical with Article 72 of the 1929 Convention.[109]

During the course of the hostilities in Vietnam, on one occasion the Vietcong unilaterally released three American servicemen for repatriation (in 1967) and the North Vietnamese did the same thing on four separate occasions (twice in 1968, once in 1969, and once in 1972).[110] These releases did not purport to have been accomplished pursuant to the second paragraph of Article 109, nor were they, as most of the men released had been prisoners of war for comparatively short periods of time and there were many others who were not released even though they had been in custody for periods up to several years longer than the individuals who were released.[111]

It appears rather unlikely that the provisions of the second paragraph of Article 109 for the repatriation of able-bodied, longtime prisoners of war will be implemented during any future international armed conflict[112]—but it was proper to include such a provision in the Convention so that it will be available as a basis for a proposal to the belligerents by the Protecting Power or the ICRC should the occasion arise.

6. Repatriation after the Cessation of Active Hostilities

It is obvious that the various types of legal termination of prisoner-of-war status during the course of hostilities discussed above will normally account for a very small percentage of the prisoners of war in enemy custody. The great majority of prisoners of war

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[108] World War II may be said to have lasted just over 6 years: from the German attack on Poland on 1 September 1939 to the surrender of Japan on 2 September 1945. Liddell Hart, *History of the Second World War* 698.

[109] The 1929 provision refers to "direct repatriation or *hospitalization* in a neutral country," while the second paragraph of Article 109 provides for "direct repatriation or *internment* in a neutral country." (Emphasis added.) The latter provision seems more appropriate as the individuals concerned are, by definition, "able-bodied," and may not necessarily be hospitalized.

[110] *See* Levie, Repatriation 702–03.

[111] *Ibid.*, 703 n.50.

[112] While the physical position of Article 117 in the Convention appears to make it applicable to able-bodied prisoners of war repatriated under the second paragraph of Article 109 (*see* note 92 *supra*), it is extremely doubtful that prohibiting such prisoners of war from being "employed on active military service" would alone suffice to convince belligerents that the relative warmaking potential of the two sides would not be affected by such repatriations, even if they were on a man-for-man basis. Thus, in the early years of the American Civil War (1861–1865) the equal exchange of able-bodied prisoners of war favored the Union, while later in that conflict, as relative manpower availability changed, it favored the Confederacy. Lewis & Mewha 30.

have always remained in that status until at least the cessation of active hostilities.[113]

Article 20 of the 1907 Hague Regulations provided that prisoner-of-war repatriation should be accomplished as quickly as possible "after the conclusion of peace."[114] The 1929 Convention purported to make a basic change in the policy in this regard contained in its predecessors. Article 75 thereof stated that an armistice agreement must, in principle, contain provisions with respect to the repatriation of prisoners of war; that if for some reason the Parties had been unable to include such provisions in the armistice agreement, they should conclude a separate agreement on the subject as soon as possible; and that, in any event, repatriation of prisoners of war should be accomplished with the least possible delay after the conclusion of peace. This meant, in effect, that prisoners of war could still be legally held in custody by the Detaining Powers for several years after the de facto end of the war.[115] Because this happened so generally at the end of World War II,[116] as early as the 1947 Conference of

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[113] By "active hostilities" is meant the "shooting war." Peace, in the legal sense, may still be months or years away.

[114] The official French version of Article 20 of the 1899 Hague Regulations was identical.

[115] The *Treaty of Peace with Japan* did not become effective until 1 May 1952. Under the two sets of Hague Regulations and the 1929 Convention, Japanese prisoners of war might legally have been held at least until that date, even though hostilities ended on 2 September 1945.

[116] *See generally* 1 ICRC *Report* 394–402. The United States did not complete the repatriation of German prisoners of war until July 1946. While transportation problems did cause some delay, probably more relevant was the continued need for prisoner-of-war labor. Lewis & Mewha 172–73; Tollefson, Enemy Prisoners of War 74. The United Kingdom completed its repatriation program in July 1948. *The Times* (London), 13 July 1948 at 3, col. 3. In January 1947 France was still detaining 630,000 German prisoners of war, making use of them in the reconstruction effort. Documentation Française at 2. The Soviet Union admitted in 1950 that it still held 12,000 German prisoners of war and in 1955, 10 years after the end of hostilities, it finally entered into an agreement with the Federal Republic of Germany for the repatriation of the 9,000 admittedly still being held, allegedly as convicted war criminals. Miller, *The Law of War* 230; Reiners, Soviet Indoctrination 43. *See also* note VI-36 *supra*. It has been stated that the Soviet Union only released prisoners of war detained by it after the termination of hostilities when such releases would have a maximum propaganda impact as, for example, at the time of the negotiations for treaties with Austria, Germany, and Japan. Vizzard, Policy 355. (One German soldier who became a prisoner of war of the Russians on 11 May 1945, after Germany's surrender, was not released until 26 August 1949. Anon., *POW in Russia* 1. He stated that the MVD "determined the political reliability of the POW and selected people for return to Germany." *Ibid.* at 2.) In December 1950 the General Assembly of the United Nations adopted a resolution calling for the prompt "unrestricted opportunity of repatriation." U.N. G.A. Res. 427, 14 December 1950, 5 U.N. GAOR, Supp. 20 at 45, U.N. Doc. A/1775 (1950). While it did not mention the Soviet Union, it was directed against that country's policy of holding prisoners of war indefinitely as slave labor. *See* Byrnes, *A*

Government Experts the proposal was made that the new convention being drafted provide for repatriation as soon as possible after the close of hostilities.[117] This suggestion was adopted and amplified by the subsequent preliminary conferences and the 1949 Diplomatic Conference and is now contained in the first paragraph of Article 118 which states: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." Moreover, the second paragraph of Article 118 requires each belligerent to act unilaterally to repatriate the prisoners of war held by it in the event that the agreement for the cessation of hostilities fails to deal with the subject, or in the event that there is no such agreement;[118] the third paragraph of Article 118 requires that the prisoners of war be advised of the plan adopted for repatriation; and the last paragraph of Article 118 provides a partial formula for the apportionment of the costs of repatriation.[119]

The first paragraph of Article 119 makes applicable to the process of post hostilities repatriation the rules found in Articles 46–48 dealing with transfers between prisoner-of-war camps.[120] The subject of the disposition of the personal property of prisoners of war is dealt with at some length. Thus, the second paragraph of Article 119 requires that the property impounded at the time when the prisoner of war was captured,[121] and any foreign currency taken from him that had not subsequently been converted,[122] be returned to him prior to repatriation; and that any such items not so returned be sent to the Information Bureau for forwarding to the Power of Origin.[123]

Review of the Problem of Missing Prisoners of War, 29 *Dept. State Bull.* 898. (The General Assembly also adopted a resolution directed against the failure of several Communist countries to repatriate Greek prisoners of war after the unsuccessful Communist attempt to take over that country had ended in October 1949. G.A. Res. 382, 1 December 1950, 5 U.N. GAOR, Supp. 20, at 14, U.N. Doc. A/1775 (1950).)

[117] 1947 GE Report 243.

[118] Thus, in November 1972, Pakistan unilaterally announced that it would repatriate all Indian prisoners of war held by it as an aftermath of the December 1971 Indo-Pakistani hostilities. *New York Times*, 28 November 1972, at 1, col. 2. (India responded by agreeing to repatriate all of the Pakistani prisoners of war captured by her on the western front during those hostilities, and the announced unilateral exchange actually became an exchange that took place on 1 December 1972. ICRC *Annual Report*, 1972 at 50).

[119] If the Detaining Power and the Power of Origin are contiguous, the Detaining Power pays the costs to its border and the Power of Origin pays from there; if they are not contiguous, the Detaining Power pays the costs to its border (or to its port nearest to the territory of the Power of Origin) and the Parties are to agree between themselves as to how the other costs are to be apportioned—with the proviso that the reaching of such an agreement is not to delay the repatriation.

[120] For a discussion of those rules, *see* pp. 187–194 *supra*. Certain portions of the fifth and ninth paragraphs of Article 122 are also applicable to repatriations.

[121] *See* pp. 110–113 *supra*.

[122] *See* pp. 113–117 *supra*. Concerning credit balances, *see* pp. 210–211 *supra*.

[123] *See* the discussion of the last paragraph of Article 122 at p. 157 *supra*.

The third paragraph of Article 119 authorizes each prisoner of war being repatriated to take with him his personal effects and any correspondence and parcels that he has received, limited to what he can carry, but with a maximum of 25 kilograms (about 55 pounds);[124] while the fourth paragraph of Article 119 provides that the Detaining Power shall take charge of the personal effects that the prisoner of war is unable to carry and shall forward them as soon as an agreement on the subject has been reached with the Power of Origin.[125] Finally, the fifth paragraph of Article 119 is similar to the second paragraph of Article 115[126] in that it permits a Detaining Power to detain a prisoner of war against whom "criminal proceedings for an indictable offense"[127] are pending, or against whom a conviction in such proceedings has already been obtained, until the completion of the proceedings and the sentence, if any;[128] and the penultimate paragraph of Article 119 requires the Detaining Power to inform the Power of Origin of the identity of prisoners of war so detained.[129]

"Active hostilities" may, of course, come to a halt either as a result of the surrender of a defeated belligerent to a victorious one,[130] or

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[124] This provision is almost identical with that of the second paragraph of Article 48. *See* p. 193 *supra*. For a detailed account of the procedure followed by the United States after World War II, see Rich, Brief History 494–96.

[125] This provision may be compared with that of the third paragraph of Article 48.

[126] *See* p. 413 *supra*.

[127] The second paragraph of Article 115 uses the term "judicial prosecution." While the two terms are probably synonymous, it would have been better draftsmanship to use identical terms in these two articles, as they deal with identical problems.

[128] This was the justification advanced by the Soviet Union for the fact that it still detained 12,000 German prisoners of war in 1950, five years after the end of World War II. Miller, *The Law of War* 230. *See* note 116 *supra*. Some armistice agreements have specifically called for the repatriation of these individuals at the same time as the other prisoners of war are repatriated. *See, e.g.*, Article IX of the 1949 Israeli-Egyptian Armistice Agreement and Article VI(2) of the 1949 Israeli-Lebanese Armistice Agreement. The 1953 Korean Armistice Agreement contained no specific provision in this regard, and the Chinese at one time indicated that they contemplated denying repatriation to United Nations Command personnel who had been convicted of crimes. (For the probable type of crime, *see* note VI-36 *supra*.) They dropped this position when advised that the United Nations Command would act in like fashion (Miller, *The Law of War* 248–49), and all prisoners of war who desired repatriation were repatriated.

[129] The seventh paragraph of Article 119 provides for the establishment of commissions to search for individuals who are missing in action and of whom no trace has been found. Such commissions are frequently concerned in the parallel task of locating and identifying the bodies of deceased members of the armed forces. *See* Articles 33 and 34 of the 1977 Protocol I.

[130] This is how the Franco-Prussian War (1870–71), World War I (1914–18), the French participation in World War II (1939–40), the Italian participation in World War II (1940–43), and World War II itself (1939–45) terminated.

as a result of an agreement between the belligerents while they each continue to field a viable armed force,[131] even though one side may have a decided advantage at the time. Where the agreement terminating hostilities has been between two undefeated nations, it has usually provided for the repatriation of the prisoners of war held by each side.[132] Where the hostilities have come to an end because of the defeat of one side and the victory of the other, the agreement terminating hostilities has frequently provided only for the immediate release of the prisoners of war held by the defeated side, leaving the release of the prisoners of war held by the victor for some future decision.[133] It was this latter situation against which the first paragraph of Article 118 was primarily directed.

Two major problems have arisen with respect to the proper interpretation of this paragraph of Article 118, quoted in full earlier in this section. The first arose in the course of the negotiation of the 1953 Korean Armistice Agreement and involved the question of the right of a prisoner of war to refuse repatriation and to request asylum either in the territory of the Detaining Power or elsewhere. It arose during the early part of 1952, and was directly responsible for increasing the time span of the hostilities in Korea by an additional year.[134] The background of the controversy, the arguments advanced, and the solution reached are exceedingly important and warrant discussion in some depth.

Historically, prisoners of war who would understandably be reluctant to accept repatriation, such as deserters, were not repatriated upon the termination of hostilities unless the agreement between the late belligerents specifically so provided;[135] and when it did so, it usually included an amnesty.[136] The older treaties of the modern era did not speak of the repatriation of prisoners of war— they provided

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[131] This is how the hostilities in Korea (1950–53) and United States participation in Vietnam (*c.* 1965–73) terminated.

[132] *See, e.g.*, Article 10 of the 1944 *Armistice Agreement between the Soviet Union and Finland;* Article 51 of the 1953 Korean Armistice Agreement; and Article 8(a) of the 1973 *Agreement on Ending the War and Restoring the Peace in Vietnam* and Article 1 of the 1973 *Protocol Concerning the Return of Captured Military Personnel. See generally Levie,* Armistice Agreement 897–99.

[133] *See, e.g.*, the 1940 Franco-German Armistice Agreement, the 1943 *Armistice Agreement with Italy,* and the 1945 Hungarian Armistice Agreement. (The latter, executed on 20 January 1945, called for the immediate return of all prisoners of war held by Hungary. The *Treaty of Peace with Hungary,* executed more than two years later, on 10 February 1947, called for the repatriation of Hungarian prisoners of war. *See also* note 115 *supra.*)

[134] Had it not been for the dispute over the question of voluntary versus involuntary repatriation, the armistice which brought the hostilities in Korea to an end would probably have been signed in June or July 1952, instead of July 1953.

[135] Grotius, *War and Peace,* Book III, Ch. I, sec. 22, n.3. *See* the discussion of the problem of the disposition of deserters and defectors at pp. 76–81 *supra.*

[136] Schapiro, Repatriation 321.

that the prisoners of war should be "set free," or "set at liberty," or merely "released."[137] Treaties of a later period entered into between Russia and Turkey permitted prisoners of war who had changed their religion to refuse repatriation.[138] The German-Russian agreement supplementary to the 1918 Treaty of Brest-Litovsk, the treaty that ended Russian participation in World War I, was but the first of approximately 20 treaties entered into by the new Soviet Russia between 1918 and 1921 containing provisions under which the individual prisoner of war had the privilege of deciding whether or not he would accept repatriation.[139] And the Treaty of Versailles, ending World War I, contained a similar provision.[140]

The practice followed during and after World War II changed somewhat,[141] although there appears to have been general acceptance of the principle that a prisoner of war could not be repatriated against

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[137] *See, e.g.*, Article CX of the *Treaty of Peace between France and Her Allies and the Holy Roman Empire and Its Allies*, Münster, Westphalia, 24 October 1648.

[138] Tuck, Retention 16–17. *See, e.g.*, the *Treaty of Kuçuk Kainardji* (1774) and the Treaty of Adrianople (1829).

[139] Tuck, Retention 32. Many of these treaties are cited and quoted in Acheson, The Prisoner Question 747–49. Article 17(1) of the German-Russian Supplement to the 1918 *Treaty of Brest-Litovsk* typically provided that:

> The prisoners of war of both parties shall be set at liberty to return home, in so far as they do not desire, with the consent of the state which took them prisoner, to remain within its boundaries, or leave for another country.

See also, Article 1 of the 1920 German-Russian Agreement with regard to the Mutual Repatriation of Prisoners of War. These Soviet treaties were with countries of all political spectra, and former allies as well as former enemies. In 1935, one student of Soviet-established policies characterized such treaties as being in conformity with the generally accepted rule that repatriation of a prisoner of war requires his free will, or consent. Taracouzio, *Soviet Union* 111-13. *See also* Ginsburgs, Refugees 344 & 359. The calls for surrender issued by the Russians to the Germans during World War II uniformly promised to give the members of the enemy armed forces the choice after hostilities ended between returning to their homeland or to any other country to which they might desire to go. Statement of General William K. Harrison, 27 *Dept. State Bull.* 172 (1952).

[140] Article 220 of the Treaty of Versailles (1919) provided that prisoners of war "who do not desire to be repatriated may be excluded from repatriation."

[141] The 1945 United States–Soviet (Yalta) Agreement Relating to Prisoners of War provided, in Article 1, that citizens of the two countries would be maintained separately from enemy prisoners of war "until they have been handed over to the Soviet or United States authorities, as the case may be." This and similar agreements entered into during and immediately after World War II resulted in the wave of suicides by members of the Soviet armed forces who had been captured by the Germans, had subsequently fallen into the hands of the Western allies of the Soviet Union, and did not desire to be repatriated to Russia, being fully aware of the fate that awaited them in the Soviet Union. *See* note I-141 *supra;* 1947 GE Report 245; Shub, *The Choice, passim;* Epstein, *Operation Keelhaul, passim;* Bethell, *The Last Secret, passim.*

his will.[142] At the 1947 Conference of Government Experts the ICRC called attention to this problem. Because of the difficulties involved in making exceptions to the general rule of repatriation and in finding asylum in the face of ever more strict immigration laws, the Government Experts "decided to maintain the general principle of repatriation of all PW nationals of a given country to that country."[143] Thereafter, at the 1949 Diplomatic Conference the representative of Austria proposed an amendment to the Stockholm draft of the relevant article. The amendment read, in part:

> Prisoners of war, however, shall be entitled to apply for their transfer to any other country which is ready to accept them.[144]

This proposal was opposed by the Soviet representative because "it could be used to the detriment of the prisoners [of war] themselves and their country"; and the United States representative agreed with this argument.[145] At a subsequent meeting the Austrian representative stated that "prisoners of war must have the option of not returning to their country if they so desire."[146] The Soviet representative disagreed because of his stated fear that the proposal "might give rise to the exercise of undue influence on the part of the Detaining Power"—and once again the United States representative concurred with him.[147] The Austrian proposal was ultimately rejected by a "large majority,"[148] and the first paragraph of Article 118 was adopted with the language indicated above.

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[142] On a number of occasions the ICRC raised "the principle which it has at all times maintained, that no person may be repatriated against his will, if he should have any valid objection." 1 ICRC *Report* 560. There is no indication that any government ever challenged the ICRC's basic contention. In all probability, however, the Soviet Union would not have been among the nations with which the point was raised. (For a post–World War II indication of the continued validity of the principle that an individual should not be returned to his homeland against his will, *see* Article 33 of the 1951 *Convention Relating to the Status of Refugees.* This provision is incorporated by reference into the 1967 Protocol on the same subject.)

[143] 1947 GE Report 245.

[144] 2A *Final Record* 324. A United Kingdom objection based on cost to the Detaining Power was eliminated by an additional provision. *Ibid.*, 462.

[145] *Ibid.*, 324.

[146] *Ibid.*, 462.

[147] *Ibid.*

[148] *Ibid.* One author aptly states that "[i]n concentrating on the individual prisoner's right to be repatriated, his right *not* to be repatriated was largely ignored." (Emphasis in original.) Lundin, Repatriation 561. Others argue that the Austrian proposal was rejected only because of the desire not to include in the Convention any provision derogating from the general principle of entitlement to repatriation (Gutteridge, Repatriation 213) or because of the difficulty of finding an asylum country (Rockwell, Right of Nonrepatriation 368 n.38) and emphasize that because a proposal is rejected by an international conference does not mean that its opposite is approved. *Ibid.*

The interpretation to be given to the wording of the first paragraph of Article 118—"shall be released and repatriated"—was soon put to the test in the Korean armistice negotiations where the dispute over "voluntary versus involuntary" and "forcible versus non-forcible" repatriation occupied the center of the stage for a considerable period of time.[149] That dispute has been the subject of a great volume of legal literature[150] and it is not proposed to do more than to restate it briefly here. Suffice it to say that the major arguments advanced in support of involuntary, forcible repatriation were (1) the legislative history mentioned above; (2) the specific language of the first paragraph of Article 118 ("shall be released and repatriated"); (3) the provision of the first paragraph of Article 6 prohibiting any agreement between the belligerents that adversely affects or restricts the rights conferred on prisoners of war by the Convention; and (4) the provision of Article 7 prohibiting a prisoner of war from renouncing any rights granted by the Convention. The major arguments advanced in favor of voluntary, nonforcible repatriation were (1) the 1949 Convention was intended to protect individuals, not States, and forced repatriation would derogate from this intent; (2) permitting a voluntary decision of the individual prisoner of war, under proper safeguards, for or against repatriation is not a restriction of the rights secured by the Convention, contrary to Article 6, but rather is a guarantee that such rights will be meaningful; (3) Article 7 was included in the Convention in order to protect a prisoner of war from being coerced into giving up his rights under the Convention while being detained in custody, not to preclude a properly supervised decision against repatriation at the time of release from custody; and (4) Article 118, while assuring the prisoner of war of a right to repatriation, does not impose upon him an irrevocable obligation to accept repatriation.[151] It is probable that the weight of the legal

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[149] *See* note 134 *supra.*

[150] A sampling of the better known of the many articles written on the subject would include: Gutteridge, The Repatriation of Prisoners of War, 2 *Int'l. & Comp. L.Q.* 207; Charmatz & Wit, Repatriation of Prisoners of War and the 1949 Geneva Convention, 62 *Yale L.J.* 39; Lundin, Repatriation of Prisoners of War: the Legal and Political Aspects, 39 *A.B.A.J.* 559; and Mayda, The Korean Repatriation Problem and International Law, 47 *A.J.I.L.* 414. Two valuable studies of the subject, written *ex post facto*, may be found in Ball, Prisoner of War Negotiations: the Korean Experience and Lesson, *N.W.C. Rev.* September 1968 at 54; and Rockwell, The Right of Nonrepatriation of Prisoners of War Captured by the United States, 83 *Yale L.J.* 358.

[151] *See* U.S. Department of State, *Legal Considerations Underlying the Position of the United Nations Command Regarding the Issue of Forced Repatriation of Prisoners of War;* United Kingdom, Foreign Office, *Korea No. 1 (1953)*, Cmd. 8793 at 11–13. It should be remarked that the fact that the third paragraph of Article 109 gives the disabled prisoner of war an option to accept or refuse repatriation during the course of hostilities (*see* note 77 *supra*), while the first paragraph of Article 118 contains no comparable provision, did not escape comment.

arguments on one side or the other was not decisive in the reaching of the ultimate decision.[152]

In December 1950 the General Assembly of the United Nations had adopted two resolutions concerning the repatriation of prisoners of war, one relating to the Greeks captured during the unsuccessful Communist attempt to take over that country (1946–49) and the second relating to World War II prisoners of war still in custody. The first of those resolutions recommended the repatriation of all prisoners of war "who express the wish to be repatriated," while the second stated that the prisoners of war should be given "an unrestricted opportunity for repatriation."[153] Now, with the Korean dispute, the General Assembly was called upon once again to express itself on the question of prisoner-of-war repatriation. On 3 December 1952 it adopted a resolution which affirmed "that force shall not be used against prisoners of war to prevent or effect their return to their homelands."[154] The dispute was eventually resolved by a complicated arrangement[155] under which individual prisoners of war were interviewed in neutralized territory under the auspices of representatives of neutral States, in order to ensure the voluntariness of each decision against repatriation and to permit representatives of their homeland to attempt to dissuade those who elected not to return.[156] With respect to this solution President Eisenhower said:

> The armistice in Korea, moreover, inaugurated a new principle of freedom—that prisoners of war are entitled to choose the side

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However, it does not appear that any of the disputants thought it helpful to refer to the first paragraph of Article 66 which uses the phrase "the release of a prisoner of war *or* his repatriation." (Emphasis added.)

[152] One author, writing before an agreement was reached, said: "Public opinion in the free world is convinced that the majority in the United Nations which opposes the repatriation of prisoners of war by force is morally right, but the same public opinion is less certain of the validity of the legal case for such opposition." Gutteridge, Repatriation 207.

[153] *See* note 116 *supra*.

[154] G.A. Res. 610; 3 December 1952, 7 U.N. GAOR, Supp. 20 at 3, U.N. Doc. A/2361 (1952). The vote was 54–5–1.

[155] The *Agreement on Prisoners of War in Korea*, signed 8 June 1953, amplifies and implements the prisoner-of-war repatriation provisions of the 1953 Korean Armistice Agreement itself. Neither the prisoner-of-war agreement, nor the results of its implementation, can really be called "face-saving" for the North Koreans and Chinese Communists.

[156] Because of the methods adopted by the Communist interrogators and the anti-Communist prisoners of war, only a comparatively small percentage of the North Korean and Chinese prisoners of war who had previously declared themselves against repatriation were actually interviewed—and thousands of them refused repatriation. One British and 18 American prisoners of war held by the Communists refused repatriation at the time. The number of South Koreans who elected to remain in North Korea is impossible to determine with any degree of exactitude.

to which they wish to be released. In its impact on history, that one principle may weigh more than any battle of our time.[157] Needless to say, the Communists felt otherwise.[158] It remains to be seen whether the decision reached in Korea will be accepted as the established rule of international law and as the proper application of the first paragraph of Article 118 of the Convention.[159]

The second major problem of interpretation that has arisen with respect to the first paragraph of Article 118 concerns the words "without delay after the cessation of active hostilities." The question to be solved is the method of determining that there has been a "cessation of active hostilities" within the meaning of the Article.

The Indo-Pakistani armed conflict that began early in December 1971, when India invaded what was then East Pakistan, ended on 16 December 1971 when the Pakistani commander in chief signed what amounted to an unconditional surrender of all Pakistani armed forces in East Pakistan.[160] On 21 December 1971 the Security Council of the United Nations noted that "a cease fire and a cessation of hostilities prevail" between India and Pakistan.[161] Nevertheless, in

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[157] Eisenhower, "Address at the Columbia University National Bicentennial Dinner," *Public Papers of the Presidents of the United States: Dwight D. Eisenhower—1954* at 521–22. The Senate Foreign Relations Committee concurred in the position taken by the United Nations Command and in the solution reached. 1955 *Senate Report* 24. The ICRC, which had supported voluntary repatriation during World War II (see note 142 *supra*), continues to take that position. Pictet, *Commentary* 541–49. For the principles to be derived from the agreement reached, *see* Stone, *Legal Controls* 664. *See also*, Baxter, Asylum 495.

[158] Hess, Post-Korea 53. As the Soviet Union, for ideological reasons, was compelled to support the North Korean and Chinese position condemning voluntary repatriation and demanding forcible repatriation [see Vyshinsky, 7 U.N. GAOR, 1st Comm. 37, 89 (1952)], it may be said that it has reversed the position which it had espoused in the vast majority of treaties on the subject entered into by it after World War I and the actions taken by it during World War II. Ginsburgs, Refugees 361. *See* note 139 *supra*. *But see* Miller, *The Law of War* 230.

[159] The problem did not arise in the Sino-Indian hostilities (1962–63). Miller, *The Law of War* 250. While the People's Republic of China did accept voluntary repatriation for civilians, they probably did so because of the textual differences between the Third and Fourth Conventions. Cohen & Leng, Sino-Indian Dispute 310–11. The problem did not arise in any of the Middle East armed conflicts (1956, 1967, 1973), nor in the Indo-Pakistani armed conflict (1971). Among the Paris agreements on Vietnam, the 1973 *Agreement on Ending the War and Restoring the Peace in Vietnam* and the 1973 *Protocol Concerning the Return of Captured Military Personnel* both called for the return of all captured military personnel. The absence of a dispute on this subject probably resulted from the fact that the South Vietnamese had already released all personnel in their custody who had indicated an unwillingness to accept repatriation. Rockwell, The Right of Nonrepatriation 366 n.31.

[160] *New York Times*, 17 December 1971 at 1, cols. 5–6.

[161] S.C. Res. 307, 21 December 1971, 26 SCOR, *Resolutions and Decisions of the Security Council 1971* at 11, U.N. Doc. S/INF/27 (1972) [*reprinted* in 66 *A.J.I.L.* 710 and 11 *I.L.M.* 125 (1972)].

the months that followed, India refused to repatriate the more than 90,000 Pakistanis whom she held as prisoners of war, one reason given being that, although there has been a cessation of active hostilities, the event that under Article 118 calls for the repatriation of prisoners of war "without delay," the possibility of a renewal of hostilities could not be excluded.[162] There is certainly merit to this contention, and it is doubtful that any student of the law of armed conflict would contend that the Pakistanis who had been taken into custody on and shortly after 16 December 1971 should have been released and repatriated without delay immediately after the 21 December 1971 determination of the Security Council that there had been a cessation of hostilities. But month followed month without a resumption of hostilities, the Parties reached a partial political agreement in July 1972,[163] and still India refused to comply with the first paragraph of Article 118.[164] It is clear that, however justified India may have been originally in delaying repatriation, the justification was valid only until she was assured that there was actually a "cessation of active hostilities"—something that must have been completely clear within 30 or 60 days after the surrender. There can be little question but that India delayed the release and repatriation of the Pakistani prisoners of war not because she was afraid that hostilities might be resumed, but because she was using the prisoners of war as hostages in an attempt to force Pakistan to accept the secession of East Pakistan and to recognize it as the new independent People's Republic of Bangladesh.[165]

The question that arises out of this incident is when has there been a "cessation of active hostilities" within the meaning of Article 118 so that the repatriation of prisoners of war must begin in order to comply with the requirement of being "without delay"? Lauterpacht interpreted "cessation of active hostilities" to mean "a cessation of hostilities as the result of total surrender or of such circumstances or conditions of an armistice as render it out of the question for the

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[162] Letter, No. GEN/103/4/72 dated 4 September 1972, from the Indian Permanent Representative at the United Nations Office in Geneva to the Secretary-General of the International Commission of Jurists. (Original on file in the office of the Secretary-General, International Commission of Jurists, Geneva.)

[163] The *Simla Agreement* of 3 July 1972.

[164] Repatriation did not begin until late 1973 (after the signing of the *Delhi Agreement* of 28 August 1973), almost two years after the cessation of active hostilities. It was not completed until the spring of 1974.

[165] *New York Times*, 19 March 1972 at 1, cols. 6–7. Writing in 1963, long before the dispute arose, an Indian author said that a "[n]umber of phoney [*sic*] reasons are given by the detaining power to justify his illegal detention of prisoners [of war]." Hingorani, *Prisoners of War* 208. The applicability of that statement to the Indian action concerning the Pakistani prisoners of war after the December 1971 armed conflict is patent.

defeated party to resume hostilities."[166] As noted above, there is considerable merit to this position— but, unfortunately, it does not help in the search for an overall answer to the basic question propounded.[167] Probably, the most generally acceptable answer would be a variable one: (1) when there is a victorious side and a defeated side, the repatriation of prisoners of war held by *both* sides should take place without delay upon the cessation of active hostilities;[168] (2) even if there is a victor and a vanquished, and an armistice with a cessation of hostilities between them, the process of repatriation of the prisoners of war held by the victor should not normally be instituted if overall hostilities continue;[169] (3) if there are two undefeated belligerents when active hostilities cease, the repatriation of the prisoners of war held by both sides should take place without delay;[170] and (4) in the unusual case where one side fears the possibility of a resumption of hostilities, the decision as to the validity of the basis for such fear, and the decision as to whether the process of repatriation should begin, should be made, not unilaterally by an interested party as India did, but by some neutral agency such as the Protecting Powers.[171]

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[166] Lauterpacht-Oppenheim 613. It was chiefly upon this statement that India relied for its two-year delay in repatriating the Pakistani prisoners of war. Letter, note 162 *supra*.

[167] A French scholar has taken the position that once there is a cessation of active hostilities, as there was in the Indo-Pakistani armed conflict, the only permissible delay in the repatriation of prisoners of war is that necessary to organize the logistics of the repatriation. Bretton, De quelques problèmes du droit de la guerre dans le conflit indo-pakistanais, 18 *Annuaire français de droit international* 201. It would appear that this goes too far in the other direction.

[168] This was probably the situation which was primarily in the minds of the draftsmen of the first paragraph of Article 118 who, in 1947, 1948, and 1949, were witnesses to the continued detention by the victors of prisoners of war, mostly German and Japanese, taken in a war that had ended in May and September 1945 respectively. *See* note 116 *supra*. Article 85(4)(b) of the 1977 Protocol I makes "unjustifiable delay in the repatriation of prisoners of war or civilians" a grave breach of the Protocol. Presumably, this refers to repatriation after the cessation of active hostilities.

[169] During World War II the Germans released many French prisoners of war in France. Some were subsequently taken back into custody but were then frequently denied prisoner-of-war status; and some of those released who were caught while attempting to reach England in order to rejoin the fighting received severe penalties, although as prisoners of war attempted escape should have brought only minor disciplinary punishment. *See* p. 406 *supra*. However, in a situation such as occurred when Germany surrendered in May 1945, while Japan continued to fight, no reason can be perceived for delaying repatriation of the prisoners of war of the defeated nation, as their ability to aid the remaining belligerent is minimal.

[170] In this situation there is normally no problem, as a provision for the repatriation of prisoners of war by both sides will undoubtedly be included in any agreement for the cessation of hostilities.

[171] While it could be assumed that Protecting Powers would act humanely, it could also be assumed that they could be depended upon not to act precipitously as

It is fairly evident that, for one reason or another, victorious belligerents will continue to be reluctant to begin the repatriation of prisoners of war promptly upon the cessation of active hostilities. The reason for this reluctance might well be a fear, valid or invalid, of the possibility of the resumption of hostilities; it might also be based upon a desire to extort political or other concessions from the defeated State; or upon the desire to continue to have the prisoner-of-war labor available for reconstruction or other purposes. Here again is an area where the other Parties to the Convention can (and should) perform a valuable humanitarian service by inducing compliance with the provisions of the first paragraph of Article 118 by reluctant victors.

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they would certainly not want to embroil themselves by calling for repatriation only to see a subsequent resumption of hostilities. Of course, the international commission suggested by this author (*see* pp. 19–22) could exercise this function as well as the others proposed for it. Once again, it is believed that this function should not be assigned to a political organ such as the Security Council of the United Nations. (The 21 December 1971 resolution of the Security Council, cited above at p. 426, was so cited as some evidence of the cessation of hostilities, not as being conclusive thereof.)

APPENDIX A

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF AUGUST 12, 1949

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War, have agreed as follows:

TS 846.
47 Stat. 2021.

PART I

GENERAL PROVISIONS

ARTICLE 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

ARTICLE 2

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

ARTICLE 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

ARTICLE 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

ARTICLE 6

In addition to the agreements expressly provided for in Articles 10, 23, 28, 33, 60, 65, 66, 67, 72, 73, 75, 109, 110, 118, 119, 122 and 132, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them.

Prisoners of war shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

ARTICLE 7

Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

ARTICLE 8

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

ARTICLE 9

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial

humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.

ARTICLE 10

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When prisoners of war do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

ARTICLE 11

In cases where they deem it advisable in the interest of protected persons particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers

may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

PART II

GENERAL PROTECTION OF PRISONERS OF WAR

ARTICLE 12

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

ARTICLE 13

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Measures of reprisal against prisoners of war are prohibited.

ARTICLE 14

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.

Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.

ARTICLE 15

The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.

ARTICLE 16

Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.

PART III

CAPTIVITY

SECTION I

BEGINNING OF CAPTIVITY

ARTICLE 17

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname,

first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 × 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph.

The questioning of prisoners of war shall be carried out in a language which they understand.

ARTICLE 18

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment.

At no time should prisoners of war be without identity documents. The Detaining Power shall supply such documents to prisoners of war who possess none.

Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.

Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said receipt. Sums in the currency of the Detaining Power, or which are changed into such currency at the prisoner's request, shall be placed to the credit of the prisoner's account as provided in Article 64.

The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply.

Such objects, likewise sums taken away in any currency other than that of the Detaining Power and the conversion of which has not been asked for by the owners,

shall be kept in the custody of the Detaining Power and shall be returned in their initial shape to prisoners of war at the end of their captivity.

ARTICLE 19

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.

Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

ARTICLE 20

The evacuation of prisoners of war shall always be effected humanely and in conditions similar to those for the forces of the Detaining Power in their changes of station.

The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during evacuation, and shall establish as soon as possible a list of the prisoners of war who are evacuated.

If prisoners of war must, during evacuation, pass through transit camps, their stay in such camps shall be as brief as possible.

SECTION II

INTERNMENT OF PRISONERS OF WAR

CHAPTER I

GENERAL OBSERVATIONS

ARTICLE 21

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to

the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend. Such measures shall be taken particularly in cases where this may contribute to the improvement of their state of health. No prisoner of war shall be compelled to accept liberty on parole or promise.

Upon the outbreak of hostilities, each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise. Prisoners of war who are paroled or who have given their promise in conformity with the laws and regulations so notified, are bound on their personal honour scrupulously to fulfil, both towards the Power on which they depend and towards the Power which has captured them, the engagements of their paroles or promises. In such cases, the Power on which they depend is bound neither to require nor to accept from them any service incompatible with the parole or promise given.

ARTICLE 22

Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.

Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate.

The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.

ARTICLE 23

No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may

enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them.

Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps.

Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner of war camps shall be marked as such.

ARTICLE 24

Transit or screening camps of a permanent kind shall be fitted out under conditions similar to those described in the present Section, and the prisoners therein shall have the same treatment as in other camps.

CHAPTER II

QUARTERS, FOOD AND CLOTHING OF PRISONERS OF WAR

ARTICLE 25

Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.

The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets.

The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular between dusk and lights out. All precautions must be taken against the danger of fire.

In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them.

ARTICLE 26

The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners.

The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed.

Sufficient drinking water shall be supplied to prisoners of war. The use of tobacco shall be permitted.

Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession.

Adequate premises shall be provided for messing.

Collective disciplinary measures affecting food are prohibited.

ARTICLE 27

Clothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the Detaining Power, which shall make allowance for the climate of the region where the prisoners are detained. Uniforms of enemy armed forces captured by the Detaining Power should, if suitable for the climate, be made available to clothe prisoners of war.

The regular replacement and repair of the above articles shall be assured by the Detaining Power. In addition, prisoners of war who work shall receive appropriate clothing, wherever the nature of the work demands.

ARTICLE 28

Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local market prices.

The profits made by camp canteens shall be used for the benefit of the prisoners; a special fund shall be created for this purpose. The prisoners' representative shall have the right to collaborate in the management of the canteen and of this fund.

When a camp is closed down, the credit balance of the special fund shall be handed to an international welfare organization, to be employed for the benefit of prisoners of war of the same nationality as those who have contributed to the fund. In case of a general repatriation, such profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

CHAPTER III

HYGIENE AND MEDICAL ATTENTION

ARTICLE 29

The Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics.

Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them.

Also, apart from the baths and showers with which the camps shall be furnished, prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.

ARTICLE 30

Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.

Prisoners of war suffering from serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future. Special facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation.

Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality.

Prisoners of war may not be prevented from presenting themselves to the medical authorities for examination. The detaining authorities shall, upon request, issue to every prisoner who has undergone treatment, an official certificate indicating the nature of his illness or injury, and the duration and kind of treatment received. A duplicate of this certificate shall be forwarded to the Central Prisoners of War Agency.

The costs of treatment, including those of any apparatus necessary for the maintenance of prisoners of war in good health, particularly dentures and other artificial appliances, and spectacles, shall be borne by the Detaining Power.

ARTICLE 31

Medical inspections of prisoners of war shall be held at least once a month. They shall include the checking and the recording of the weight of each prisoner of war.

Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of prisoners and to detect contagious diseases, especially tuberculosis, malaria and venereal disease. For this purpose the most efficient methods available shall be employed, e.g. periodic mass miniature radiography for the early detection of tuberculosis.

ARTICLE 32

Prisoners of war who, though not attached to the medical service of their armed forces, are physicians, surgeons, dentists, nurses or medical orderlies, may be required by the Detaining Power to exercise their medical functions in the interests of prisoners of war dependent on the same Power. In that case they shall continue to be prisoners of war, but shall receive the same treatment as corresponding medical personnel retained by the Detaining Power. They shall be exempted from any other work under Article 49.

CHAPTER IV

MEDICAL PERSONNEL AND CHAPLAINS RETAINED TO ASSIST PRISONERS OF WAR

ARTICLE 33

Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of, and religious ministration to prisoners of war.

They shall continue to exercise their medical and spiritual functions for the benefit of prisoners of war, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the Detaining Power and under the control of its competent services, in accordance with their professional etiquette. They shall also benefit by the following facilities in the exercise of their medical or spiritual functions:

(a) They shall be authorized to visit periodically prisoners of war situated in working detachments or in hospitals outside the camp. For this purpose, the Detaining Power shall place at their disposal the necessary means of transport.

(b) The senior medical officer in each camp shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel. For this purpose, Parties to the conflict shall agree at the outbreak of hostilities on the subject of the corresponding ranks of the medical personnel, including that of societies mentioned in Article 26 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949. This senior medical officer, as well as chaplains, shall have the right to deal with the competent authorities of the camp on all questions relating to their duties. Such authorities shall afford them all necessary facilities for correspondence relating to these questions.

TIAS 3362.
Ante, p. 3132.

(c) Although they shall be subject to the internal discipline of the camp in which they are retained, such personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties.

During hostilities, the Parties to the conflict shall agree concerning the possible relief of retained personnel and shall settle the procedure to be followed.

None of the preceding provisions shall relieve the Detaining Power of its obligations with regard to prisoners of war from the medical or spiritual point of view.

CHAPTER V

RELIGIOUS, INTELLECTUAL AND PHYSICAL ACTIVITIES

ARTICLE 34

Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities.

Adequate premises shall be provided where religious services may be held.

ARTICLE 35

Chaplains who fall into the hands of the enemy Power and who remain or are retained with a view to assisting prisoners of war, shall be allowed to minister to them and to exercise freely their ministry amongst prisoners of war of the same religion, in accordance with their religious conscience. They shall be allocated among the various camps and labour detachments containing prisoners of war belonging to the same forces, speaking the same language or practising the same religion. They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting the prisoners of war outside their camp. They shall be free to correspond, subject to censor-

ship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Letters and cards which they may send for this purpose shall be in addition to the quota provided for in Article 71.

ARTICLE 36

Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, to minister freely to the members of their community. For this purpose, they shall receive the same treatment as the chaplains retained by the Detaining Power. They shall not be obliged to do any other work.

ARTICLE 37

When prisoners of war have not the assistance of a retained chaplain or of a prisoner of war minister of their faith, a minister belonging to the prisoners' or a similar denomination, or in his absence a qualified layman, if such a course is feasible from a confessional point of view, shall be appointed, at the request of the prisoners concerned, to fill this office. This appointment, subject to the approval of the Detaining Power, shall take place with the agreement of the community of prisoners concerned and, wherever necessary, with the approval of the local religious authorities of the same faith. The person thus appointed shall comply with all regulations established by the Detaining Power in the interests of discipline and military security.

ARTICLE 38

While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.

Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors. Sufficient open spaces shall be provided for this purpose in all camps.

CHAPTER VI

DISCIPLINE

ARTICLE 39

Every prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining

Power. Such officer shall have in his possession a copy of the present Convention; he shall ensure that its provisions are known to the camp staff and the guard and shall be responsible, under the direction of his government, for its application.

Prisoners of war, with the exception of officers, must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying in their own forces.

Officer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power; they must, however, salute the camp commander regardless of his rank.

ARTICLE 40

The wearing of badges of rank and nationality, as well as of decorations, shall be permitted.

ARTICLE 41

Post, p. 3432.

In every camp the text of the present Convention and its Annexes and the contents of any special agreement provided for in Article 6, shall be posted, in the prisoners' own language, in places where all may read them. Copies shall be supplied, on request, to the prisoners who cannot have access to the copy which has been posted.

Regulations, orders, notices and publications of every kind relating to the conduct of prisoners of war shall be issued to them in a language which they understand. Such regulations, orders and publications shall be posted in the manner described above and copies shall be handed to the prisoners' representative. Every order and command addressed to prisoners of war individually must likewise be given in a language which they understand.

ARTICLE 42

The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.

CHAPTER VII

RANK OF PRISONERS OF WAR

ARTICLE 43

Upon the outbreak of hostilities, the Parties to the conflict shall communicate to one another the titles and ranks of all the persons mentioned in Article 4 of the present Convention, in order to ensure equality of treatment between prisoners of equivalent

rank. Titles and ranks which are subsequently created shall form the subject of similar communications.

The Detaining Power shall recognize promotions in rank which have been accorded to prisoners of war and which have been duly notified by the Power on which these prisoners depend.

ARTICLE 44

Officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

In order to ensure service in officers' camps, other ranks of the same armed forces who, as far as possible, speak the same language, shall be assigned in sufficient numbers, account being taken of the rank of officers and prisoners of equivalent status. Such orderlies shall not be required to perform any other work.

Supervision of the mess by the officers themselves shall be facilitated in every way.

ARTICLE 45

Prisoners of war other than officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

Supervision of the mess by the prisoners themselves shall be facilitated in every way.

CHAPTER VIII

TRANSFER OF PRISONERS OF WAR AFTER THEIR ARRIVAL IN CAMP

ARTICLE 46

The Detaining Power, when deciding upon the transfer of prisoners of war, shall take into account the interests of the prisoners themselves, more especially so as not to increase the difficulty of their repatriation.

The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred. Account shall always be taken of the climatic conditions to which the prisoners of war are accustomed and the conditions of transfer shall in no case be prejudicial to their health.

The Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention. The Detaining Power shall take adequate precautions especially in case of transport by sea or by air, to ensure their safety during transfer, and shall draw up a complete list of all transferred prisoners before their departure.

ARTICLE 47

Sick or wounded prisoners of war shall not be transferred as long as their recovery may be endangered by the journey, unless their safety imperatively demands it.

If the combat zone draws closer to a camp, the prisoners of war in the said camp shall not be transferred unless their transfer can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.

ARTICLE 48

In the event of transfer, prisoners of war shall be officially advised of their departure and of their new postal address. Such notifications shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of transfer so require, to what each prisoner can reasonably carry, which shall in no case be more than twenty-five kilograms per head.

Mail and parcels addressed to their former camp shall be forwarded to them without delay. The camp commander shall take, in agreement with the prisoners' representative, any measures needed to ensure the transport of the prisoners' community property and of the luggage they are unable to take with them in consequence of restrictions imposed by virtue of the second paragraph of this Article.

The costs of transfers shall be borne by the Detaining Power.

SECTION III

LABOUR OF PRISONERS OF WAR

ARTICLE 49

The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health.

Non-commissioned officers who are prisoners of war shall only be required to do supervisory work. Those not so required may ask for other suitable work which shall, so far as possible, be found for them.

If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.

ARTICLE 50

Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

(a) agriculture;

(b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;

(c) transport and handling of stores which are not military in character or purpose;

(d) commercial business, and arts and crafts;

(e) domestic service;

(f) public utility services having no military character or purpose.

Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78.

ARTICLE 51

Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work; account shall also be taken of climatic conditions.

The Detaining Power, in utilizing the labour of prisoners of war, shall ensure that in areas in which such prisoners are employed, the national legislation concerning the protection of labour, and, more particularly, the regulations for the safety of workers, are duly applied.

Prisoners of war shall receive training and be provided with the means of protection suitable to the work they will have to do and similar to those accorded to the nationals of the Detaining Power. Subject to the provisions of Article 52, prisoners may be submitted to the normal risks run by these civilian workers.

Conditions of labour shall in no case be rendered more arduous by disciplinary measures.

ARTICLE 52

Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature.

No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces.

The removal of mines or similar devices shall be considered as dangerous labour.

ARTICLE 53

The duration of the daily labour of prisoners of war, including the time of the journey to and fro, shall not be excessive, and must in no case exceed that permitted for civilian workers in the district, who are nationals of the Detaining Power and employed on the same work.

Prisoners of war must be allowed, in the middle of the day's work, a rest of not less than one hour. This rest will be the same as that to which workers of the Detaining Power are entitled, if the latter is of longer duration. They shall be allowed in addition a rest of twenty-four consecutive hours every week, preferably on Sunday or the day of rest in their country of origin. Furthermore, every prisoner who has worked for one year shall be granted a rest of eight consecutive days, during which his working pay shall be paid him.

If methods of labour such as piece work are employed, the length of the working period shall not be rendered excessive thereby.

ARTICLE 54

The working pay due to prisoners of war shall be fixed in accordance with the provisions of Article 62 of the present Convention.

Prisoners of war who sustain accidents in connection with work, or who contract a disease in the course, or in consequence of their work, shall receive all the care their condition may require. The Detaining Power shall furthermore deliver to such prisoners of war a medical certificate enabling them to submit their claims to the Power on which they depend, and shall send a duplicate to the Central Prisoners of War Agency provided for in Article 123.

ARTICLE 55

The fitness of prisoners of war for work shall be periodically verified by medical examinations at least once a month. The examinations shall have particular regard to the nature of the work which prisoners of war are required to do.

If any prisoner of war considers himself incapable of working, he shall be permitted to appear before the medical authorities of his camp. Physicians or surgeons may recommend that the prisoners who are, in their opinion, unfit for work, be exempted therefrom.

ARTICLE 56

The organization and administration of labour detachments shall be similar to those of prisoner of war camps.

Every labour detachment shall remain under the control of and administratively part of a prisoner of war camp. The military authorities and the commander of the said camp shall be responsible, under the direction of their government, for the observance of the provisions of the present Convention in labour detachments.

The camp commander shall keep an up-to-date record of the labour detachments dependent on his camp, and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross, or of other agencies giving relief to prisoners of war, who may visit the camp.

ARTICLE 57.

The treatment of prisoners of war who work for private persons, even if the latter are responsible for guarding and protecting them, shall not be inferior to that which is provided for by the present Convention. The Detaining Power, the military authorities and the commander of the camp to which such prisoners belong shall be entirely responsible for the maintenance, care, treatment, and payment of the working pay of such prisoners of war.

Such prisoners of war shall have the right to remain in communication with the prisoners' representatives in the camps on which they depend.

SECTION IV

FINANCIAL RESOURCES OF PRISONERS OF WAR

ARTICLE 58

Upon the outbreak of hostilities, and pending an arrangement on this matter with the Protecting Power, the Detaining Power may determine the maximum amount of money in cash or in any similar form, that prisoners may have in their possession. Any amount in excess, which was properly in their possession and which has been taken or withheld from them, shall be placed to their account, together with any monies deposited by them, and shall not be converted into any other currency without their consent.

If prisoners of war are permitted to purchase services or commodities outside the camp against payment in cash, such payments shall be made by the prisoner himself or by the camp administration who will charge them to the accounts of the prisoners concerned. The Detaining Power will establish the necessary rules in this respect.

ARTICLE 59

Cash which was taken from prisoners of war, in accordance with Article 18, at the time of their capture, and which is in the currency of the Detaining Power, shall be placed to their separate accounts, in accordance with the provisions of Article 64 of the present Section.

The amounts, in the currency of the Detaining Power, due to the conversion of sums in other currencies that are taken from the prisoners of war at the same time, shall also be credited to their separate accounts.

ARTICLE 60

The Detaining Power shall grant all prisoners of war a monthly advance of pay, the amount of which shall be fixed by conversion, into the currency of the said Power, of the following amounts:

Category I : Prisoners ranking below sergeants: eight Swiss francs.

Category II : Sergeants and other non-commissioned officers, or prisoners of equivalent rank: twelve Swiss francs.

Category III : Warrant officers and commissioned officers below the rank of major or prisoners of equivalent rank: fifty Swiss francs.

Category IV : Majors, lieutenant-colonels, colonels or prisoners of equivalent rank: sixty Swiss francs.

Category V : General officers or prisoners of war of equivalent rank: seventy-five Swiss francs.

However, the Parties to the conflict concerned may by special agreement modify the amount of advances of pay due to prisoners of the preceding categories.

Furthermore, if the amounts indicated in the first paragraph above would be unduly high compared with the pay of the Detaining Power's armed forces or would, for any reason, seriously embarrass the Detaining Power, then, pending the conclusion of a special agreement with the Power on which the prisoners depend to vary the amounts indicated above, the Detaining Power:

(a) shall continue to credit the accounts of the prisoners with the amounts indicated in the first paragraph above;

(b) may temporarily limit the amount made available from these advances of pay to prisoners of war for their own use, to sums which are reasonable, but which, for Category I, shall never be inferior to the amount that the Detaining Power gives to the members of its own armed forces.

The reasons for any limitations will be given without delay to the Protecting Power.

ARTICLE 61

The Detaining Power shall accept for distribution as supplementary pay to prisoners of war sums which the Power on which the prisoners depend may forward to them, on condition that the sums to be paid shall be the same for each prisoner of the same category, shall be payable to all prisoners of that category depending on that Power, and shall be placed in their separate accounts, at the earliest opportunity, in accordance with the provisions of Article 64. Such supplementary pay shall not relieve the Detaining Power of any obligation under this Convention.

ARTICLE 62

Prisoners of war shall be paid a fair working rate of pay by the detaining authorities direct. The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day. The Detaining Power shall inform prisoners of war, as well as the Power on which they depend, through the intermediary of the Protecting Power, of the rate of daily working pay that it has fixed.

Working pay shall likewise be paid by the detaining authorities to prisoners of war permanently detailed to duties or to a skilled or semi-skilled occupation in connection with the administration, installation or maintenance of camps, and to the prisoners who are required to carry out spiritual or medical duties on behalf of their comrades.

The working pay of the prisoners' representative, of his advisers, if any, and of his assistants, shall be paid out of the fund maintained by canteen profits. The scale of this working pay shall be fixed by the prisoners' representative and approved by the camp commander. If there is no such fund, the detaining authorities shall pay these prisoners a fair working rate of pay.

ARTICLE 63

Prisoners of war shall be permitted to receive remittances of money addressed to them individually or collectively.

Every prisoner of war shall have at his disposal the credit balance of his account as provided for in the following Article, within the limits fixed by the Detaining Power, which shall make such payments as are requested. Subject to financial or monetary restrictions which the Detaining Power regards as essential, prisoners of war may also have payments made abroad. In this case payments addressed by prisoners of war to dependents shall be given priority.

In any event, and subject to the consent of the Power on which they depend, prisoners may have payments made in their own country, as follows: the Detaining Power shall send to the aforesaid Power through the Protecting Power, a notification giving

all the necessary particulars concerning the prisoners of war, the beneficiaries of the payments, and the amount of the sums to be paid, expressed in the Detaining Power's currency. The said notification shall be signed by the prisoners and countersigned by the camp commander. The Detaining Power shall debit the prisoners' account by a corresponding amount; the sums thus debited shall be placed by it to the credit of the Power on which the prisoners depend.

To apply the foregoing provisions, the Detaining Power may usefully consult the Model Regulations in Annex V of the present Convention.

ARTICLE 64

The Detaining Power shall hold an account for each prisoner of war, showing at least the following:

(1) The amounts due to the prisoner or received by him as advances of pay, as working pay or derived from any other source; the sums in the currency of the Detaining Power which were taken from him; the sums taken from him and converted at his request into the currency of the said Power.

(2) The payments made to the prisoner in cash, or in any other similar form; the payments made on his behalf and at his request; the sums transferred under Article 63, third paragraph.

ARTICLE 65

Every item entered in the account of a prisoner of war shall be countersigned or initialled by him, or by the prisoners' representative acting on his behalf.

Prisoners of war shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts, which may likewise be inspected by the representatives of the Protecting Powers at the time of visits to the camp.

When prisoners of war are transferred from one camp to another, their personal accounts will follow them. In case of transfer from one Detaining Power to another, the monies which are their property and are not in the currency of the Detaining Power will follow them. They shall be given certificates for any other monies standing to the credit of their accounts.

The Parties to the conflict concerned may agree to notify to each other at specific intervals through the Protecting Power, the amount of the accounts of the prisoners of war.

ARTICLE 66

On the termination of captivity, through the release of a prisoner of war or his repatriation, the Detaining Power shall give him a statement, signed by an authorized officer of that Power, showing the credit balance then due to him. The Detaining Power

shall also send through the Protecting Power to the government upon which the prisoner of war depends, lists giving all appropriate particulars of all prisoners of war whose captivity has been terminated by repatriation, release, escape, death or any other means, and showing the amount of their credit balances. Such lists shall be certified on each sheet by an authorized representative of the Detaining Power.

Any of the above provisions of this Article may be varied by mutual agreement between any two Parties to the conflict.

The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity.

ARTICLE 67

Advances of pay, issued to prisoners of war in conformity with Article 60, shall be considered as made on behalf of the Power on which they depend. Such advances of pay, as well as all payments made by the said Power under Article 63, third paragraph, and Article 68, shall form the subject of arrangements between the Powers concerned, at the close of hostilities.

ARTICLE 68

Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends, through the Protecting Power. In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment given for it. This statement will be signed by a responsible officer of the Detaining Power and the medical particulars certified by a medical officer.

Any claim by a prisoner of war for compensation in respect of personal effects monies or valuables impounded by the Detaining Power under Article 18 and not forthcoming on his repatriation, or in respect of loss alleged to be due to the fault of the Detaining Power or any of its servants, shall likewise be referred to the Power on which he depends. Nevertheless, any such personal effects required for use by the prisoners of war whilst in captivity shall be replaced at the expense of the Detaining Power. The Detaining Power will, in all cases, provide the prisoner of war with a statement, signed by a responsible officer, showing all available information regarding the reasons why such effects, monies or valuables have not been restored to him. A copy of this statement will be forwarded to the Power on which he depends through the Central Prisoners of War Agency provided for in Article 123.

SECTION V

RELATIONS OF PRISONERS OF WAR WITH THE EXTERIOR

ARTICLE 69

Immediately upon prisoners of war falling into its power, the Detaining Power shall inform them and the Powers on which they depend, through the Protecting Power, of the measures taken to carry out the provisions of the present Section. They shall likewise inform the parties concerned of any subsequent modifications of such measures.

ARTICLE 70

Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or to another camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the model annexed to the present Convention, informing his relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner.

ARTICLE 71

Prisoners of war shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each prisoner of war, the said number shall not be less than two letters and four cards monthly, exclusive of the capture cards provided for in Article 70, and conforming as closely as possible to the models annexed to the present Convention. Further limitations may be imposed only if the Protecting Power is satisfied that it would be in the interests of the prisoners of war concerned to do so owing to difficulties of translation caused by the Detaining Power's inability to find sufficient qualified linguists to carry out the necessary censorship. If limitations must be placed on the correspondence addressed to prisoners of war, they may be ordered only by the Power on which the prisoners depend, possibly at the request of the Detaining Power. Such letters and cards must be conveyed by the most rapid method at the disposal of the Detaining Power; they may not be delayed or retained for disciplinary reasons.

Prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin or to give them news by the ordinary postal route, as well as those who are at a great distance from their homes, shall be permitted to send telegrams, the fees being charged against the prisoners of war's accounts with the

Detaining Power or paid in the currency at their disposal. They shall likewise benefit by this measure in cases of urgency.

As a general rule, the correspondence of prisoners of war shall be written in their native language. The Parties to the conflict may allow correspondence in other languages.

Sacks containing prisoner of war mail must be securely sealed and labelled so as clearly to indicate their contents, and must be addressed to offices of destination.

ARTICLE 72

Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.

Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

The only limits which may be placed on these shipments shall be those proposed by the Protecting Power in the interest of the prisoners themselves, or by the International Committee of the Red Cross or any other organization giving assistance to the prisoners, in respect of their own shipments only, on account of exceptional strain on transport or communications.

The conditions for the sending of individual parcels and collective relief shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the prisoners of relief supplies. Books may not be included in parcels of clothing and foodstuffs. Medical supplies shall, as a rule, be sent in collective parcels.

ARTICLE 73

In the absence of special agreements between the Powers concerned on the conditions for the receipt and distribution of collective relief shipments, the rules and regulations concerning collective shipments, which are annexed to the present Convention, shall be applied.

The special agreements referred to above shall in no case restrict the right of prisoners' representatives to take possession of collective relief shipments intended for prisoners of war, to proceed to their distribution or to dispose of them in the interest of the prisoners.

Nor shall such agreements restrict the right of representatives of the Protecting Power, the International Committee of the Red Cross or any other organization giving assistance to prisoners of war and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

ARTICLE 74

All relief shipments for prisoners of war shall be exempt from import, customs and other dues.

Correspondence, relief shipments and authorized remittances of money addressed to prisoners of war or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 122 and the Central Prisoners of War Agency provided for in Article 123, shall be exempt from any postal dues, both in the countries of origin and destination, and in intermediate countries.

If relief shipments intended for prisoners of war cannot be sent through the post office by reason of weight or for any other cause, the cost of transportation shall be borne by the Detaining Power in all the territories under its control. The other Powers party to the Convention shall bear the cost of transport in their respective territories.

In the absence of special agreements between the Parties concerned, the costs connected with transport of such shipments, other than costs covered by the above exemption, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the rates charged for telegrams sent by prisoners of war, or addressed to them.

ARTICLE 75

Should military operations prevent the Powers concerned from fulfilling their obligation to assure the transport of the shipments referred to in Articles 70, 71, 72 and 77, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (railway wagons, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

(a) correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 123 and the National Bureaux referred to in Article 122;

(b) correspondence and reports relating to prisoners of war which the Protecting Powers, the International Committee of the Red Cross or any other body assisting the prisoners, exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport, if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

In the absence of special agreements, the costs occasioned by the use of such means of transport shall be borne proportionally by the Parties to the conflict whose nationals are benefited thereby.

ARTICLE 76

The censoring of correspondence addressed to prisoners of war or despatched by them shall be done as quickly as possible. Mail shall be censored only by the despatching State and the receiving State, and once only by each.

The examination of consignments intended for prisoners of war shall not be carried out under conditions that will expose the goods contained in them to deterioration; except in the case of written or printed matter, it shall be done in the presence of the addressee, or of a fellow-prisoner duly delegated by him. The delivery to prisoners of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by Parties to the conflict, either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

ARTICLE 77

The Detaining Powers shall provide all facilities for the transmission, through the Protecting Power or the Central Prisoners of War Agency provided for in Article 123, of instruments, papers or documents intended for prisoners of war or despatched by them, especially powers of attorney and wills.

In all cases they shall facilitate the preparation and execution of such documents on behalf of prisoners of war; in particular, they shall allow them to consult a lawyer and shall take what measures are necessary for the authentication of their signatures.

SECTION VI

RELATIONS BETWEEN PRISONERS OF WAR AND THE AUTHORITIES

CHAPTER I

COMPLAINTS OF PRISONERS OF WAR RESPECTING THE CONDITIONS OF CAPTIVITY

ARTICLE 78

Prisoners of war shall have the right to make known to the military authorities in whose power they are, their requests regarding the conditions of captivity to which they are subjected.

They shall also have the unrestricted right to apply to the representatives of the Protecting Powers either through their prisoners' representative or, if they consider it necessary, direct, in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity.

These requests and complaints shall not be limited nor considered to be a part of the correspondence quota referred to in Article 71. They must be transmitted immediately. Even if they are recognized to be unfounded, they may not give rise to any punishment.

Prisoners' representatives may send periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers.

CHAPTER II

PRISONER OF WAR REPRESENTATIVES

ARTICLE 79

In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners' representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. These prisoners' representatives shall be eligible for re-election.

In camps for officers and persons of equivalent status or in mixed camps, the senior officer among the prisoners of war shall be recognized as the camp prisoners' representative. In camps for officers, he shall be assisted by one or more advisers chosen by the officers; in mixed camps, his assistants shall be chosen from among the prisoners of war who are not officers and shall be elected by them.

Officer prisoners of war of the same nationality shall be stationed in labour camps for prisoners of war, for the purpose of carrying out the camp administration duties for which the prisoners of war are responsible. These officers may be elected as prisoners' representatives under the first paragraph of this Article. In such a case the assistants to the prisoners' representatives shall be chosen from among those prisoners of war who are not officers.

Every representative elected must be approved by the Detaining Power before he has the right to commence his duties. Where the Detaining Power refuses to approve a prisoner of war elected by his fellow prisoners of war, it must inform the Protecting Power of the reason for such refusal.

In all cases the prisoners' representative must have the same nationality, language and customs as the prisoners of war whom he represents. Thus, prisoners of war distributed in different sections of a camp, according to their nationality, language or customs, shall have for each section their own prisoners' representative, in accordance with the foregoing paragraphs.

ARTICLE 80

Prisoners' representatives shall further the physical, spiritual and intellectual well-being of prisoners of war.

In particular, where the prisoners decide to organize amongst themselves a system of mutual assistance, this organization will be within the province of the prisoners' representative, in addition to the special duties entrusted to him by other provisions of the present Convention.

Prisoners' representatives shall not be held responsible, simply by reason of their duties, for any offences committed by prisoners of war.

ARTICLE 81

Prisoners' representatives shall not be required to perform any other work, if the accomplishment of their duties is thereby made more difficult.

Prisoners' representatives may appoint from amongst the prisoners such assistants as they may require. All material facilities shall be granted them, particularly a certain freedom of movement necessary for the accomplishment of their duties (inspection of labour detachments, receipt of supplies, etc.).

Prisoners' representatives shall be permitted to visit premises where prisoners of war are detained, and every prisoner of war shall have the right to consult freely his prisoners' representative.

All facilities shall likewise be accorded to the prisoners' representatives for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, the Mixed Medical Commissions and the bodies which give assistance to prisoners of war.

Prisoners' representatives of labour detachments shall enjoy the same facilities for communication with the prisoners' representatives of the principal camp. Such communications shall not be restricted, nor considered as forming a part of the quota mentioned in Article 71.

Prisoners' representatives who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

In case of dismissal, the reasons therefor shall be communicated to the Protecting Power.

CHAPTER III

PENAL AND DISCIPLINARY SANCTIONS

I. General Provisions

ARTICLE 82

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.

ARTICLE 83

In deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures.

ARTICLE 84

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

ARTICLE 85

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

ARTICLE 86

No prisoner of war may be punished more than once for the same act or on the same charge.

ARTICLE 87

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.

No prisoner of war may be deprived of his rank by the Detaining Power, or prevented from wearing his badges.

ARTICLE 88

Officers, non-commissioned officers and men who are prisoners of war undergoing a disciplinary or judicial punishment, shall not be subjected to more severe treatment than that applied in respect of the same punishment to members of the armed forces of the Detaining Power of equivalent rank.

A woman prisoner of war shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a woman member of the armed forces of the Detaining Power dealt with for a similar offence.

In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence.

Prisoners of war who have served disciplinary or judicial sentences may not be treated differently from other prisoners of war.

II. Disciplinary Sanctions

ARTICLE 89

The disciplinary punishments applicable to prisoners of war are the following:

(1) A fine which shall not exceed 50 per cent of the advances of pay and working pay which the prisoner of war would otherwise receive under the provisions of Articles 60 and 62 during a period of not more than thirty days.

(2) Discontinuance of privileges granted over and above the treatment provided for by the present Convention.

(3) Fatigue duties not exceeding two hours daily.

(4) Confinement.

The punishment referred to under (3) shall not be applied to officers.

In no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war.

ARTICLE 90

The duration of any single punishment shall in no case exceed thirty days. Any period of confinement awaiting the hearing of a disciplinary offence or the award of disciplinary punishment shall be deducted from an award pronounced against a prisoner of war.

The maximum of thirty days provided above may not be exceeded, even if the prisoner of war is answerable for several acts at the same time when he is awarded punishment, whether such acts are related or not.

The period between the pronouncing of an award of disciplinary punishment and its execution shall not exceed one month.

When a prisoner of war is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

ARTICLE 91

The escape of a prisoner of war shall be deemed to have succeeded when :

(1) he has joined the armed forces of the Power on which he depends, or those of an allied Power;

(2) he has left the territory under the control of the Detaining Power, or of an ally of the said Power;

(3) he has joined a ship flying the flag of the Power on which he depends, or of an allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last named Power.

Prisoners of war whe have made good their escape in the sense of this Article and who are recaptured, shall not be liable to any punishment in respect of their previous escape.

ARTICLE 92

A prisoner of war who attempts to escape and is recaptured before having made good his escape in the sense of Article 91 shall be liable only to a disciplinary punishment in respect of this act, even if it is a repeated offence.

A prisoner of war who is recaptured shall be handed over without delay to the competent military authority.

Article 88, fourth paragraph, notwithstanding, prisoners of war punished as a result of an unsuccessful escape may be subjected to special surveillance. Such surveillance must not affect the state of their health, must be undergone in a prisoner of war camp, and must not entail the suppression of any of the safeguards granted them by the present Convention.

ARTICLE 93

Escape or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance if the prisoner of war is subjected to trial by judicial proceedings in respect of an offence committed during his escape or attempt to escape.

In conformity with the principle stated in Article 83, offences committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as offences against public property, theft without intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, shall occasion disciplinary punishment only.

Prisoners of war who aid or abet an escape or an attempt to escape shall be liable on this count to disciplinary punishment only.

ARTICLE 94

If an escaped prisoner of war is recaptured, the Power on which he depends shall be notified thereof in the manner defined in Article 122, provided notification of his escape has been made.

ARTICLE 95

A prisoner of war accused of an offence against discipline shall not be kept in confinement pending the hearing unless a member of the armed forces of the Detaining Power would be so kept if he were accused of a similar offence, or if it is essential in the interests of camp order and discipline.

Any period spent by a prisoner of war in confinement awaiting the disposal of an offence against discipline shall be reduced to an absolute minimum and shall not exceed fourteen days.

The provisions of Articles 97 and 98 of this Chapter shall apply to prisoners of war who are in confinement awaiting the disposal of offences against discipline.

ARTICLE 96

Acts which constitute offences against discipline shall be investigated immediately.

Without prejudice to the competence of courts and superior military authorities, disciplinary punishment may be ordered only by an officer having disciplinary powers in his capacity as camp commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers.

In no case may such powers be delegated to a prisoner of war or be exercised by a prisoner of war.

Before any disciplinary award is pronounced, the accused shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced to the accused prisoner of war and to the prisoners' representative.

A record of disciplinary punishments shall be maintained by the camp commander and shall be open to inspection by representatives of the Protecting Power.

ARTICLE 97

Prisoners of war shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

All premises in which disciplinary punishments are undergone shall conform to the sanitary requirements set forth in Article 25. A prisoner of war undergoing punishment shall be enabled to keep himself in a state of cleanliness, in conformity with Article 29.

Officers and persons of equivalent status shall not be lodged in the same quarters as non-commissioned officers or men.

Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women.

ARTICLE 98

A prisoner of war undergoing confinement as a disciplinary punishment, shall continue to enjoy the benefits of the provisions of this Convention except in so far as these are necessarily rendered inapplicable by the mere fact that he is confined. In no case may he be deprived of the benefits of the provisions of Articles 78 and 126.

A prisoner of war awarded disciplinary punishment may not be deprived of the prerogatives attached to his rank.

Prisoners of war awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, on their request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the camp infirmary or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money however, may be withheld from them until the completion of the punishment; they shall meanwhile be entrusted to the prisoners' representative, who will hand over to the infirmary the perishable goods contained in such parcels.

III. Judicial Proceedings

ARTICLE 99

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

ARTICLE 100

Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power on which the prisoners of war depend.

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

ARTICLE 101

If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.

ARTICLE 102

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

ARTICLE 103

Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.

The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

ARTICLE 104

In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial. This period of three weeks shall run as from the day on which such notification reaches the Protecting Power at the address previously indicated by the latter to the Detaining Power.

The said notification shall contain the following information:

(1) Surname and first names of the prisoner of war, his rank, his army, regimental, personal or serial number, his date of birth, and his profession or trade, if any ;

(2) Place of internment or confinement;

(3) Specification of the charge or charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable;

(4) Designation of the court which will try the case, likewise the date and place fixed for the opening of the trial.

The same communication shall be made by the Detaining Power to the prisoners' representative.

If no evidence is submitted, at the opening of a trial, that the notification referred to above was received by the Protecting Power, by the prisoner of war and by the prisoners' representative concerned, at least three weeks before the opening of the trial, then the latter cannot take place and must be adjourned.

ARTICLE 105

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent intepreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held *in camera* in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

ARTICLE 106

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

ARTICLE 107

Any judgment and sentence pronounced upon a prisoner of war shall be immediately reported to the Protecting Power in the form of a summary communication, which shall also indicate whether he has the right of appeal with a view to the quashing of the sentence or the reopening of the trial. This communication shall likewise be sent to the prisoners' representative concerned. It shall also be sent to the accused prisoner of war in a language he understands, if the sentence was not pronounced in his presence. The Detaining Power shall also immediately communicate to the Protecting Power the decision of the prisoner of war to use or to waive his right of appeal.

Furthermore, if a prisoner of war is finally convicted or if a sentence pronounced on a prisoner of war in the first instance is a death sentence, the Detaining Power shall as soon as possible address to the Protecting Power a detailed communication containing:

(1) the precise wording of the finding and sentence;

(2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defence;

(3) notification, where applicable, of the establishment where the sentence will be served.

The communications provided for in the foregoing sub-paragraphs shall be sent to the Protecting Power at the address previously made known to the Detaining Power.

ARTICLE 108

Sentences pronounced on prisoners of war after a conviction has become duly enforceable, shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

A woman prisoner of war on whom such a sentence has been pronounced shall be confined in separate quarters and shall be under the supervision of women.

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. Furthermore, they shall be entitled to receive and despatch correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the

medical care required by their state of health, and the spiritual assistance they may desire. Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph.

PART IV

TERMINATION OF CAPTIVITY

SECTION I

DIRECT REPATRIATION AND ACCOMMODATION IN NEUTRAL COUNTRIES

ARTICLE 109

Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article.

Throughout the duration of hostilities, Parties to the conflict shall endeavour, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war referred to in the second paragraph of the following Article. They may, in addition, conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

No sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities.

ARTICLE 110

The following shall be repatriated direct:

(1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.

(2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.

(3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

The following may be accommodated in a neutral country:

(1) Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in a neutral country might increase the prospects of a more certain and speedy recovery.

(2) Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat.

The conditions which prisoners of war accommodated in a neutral country must fulfil in order to permit their repatriation shall be fixed, as shall likewise their status, by agreement between the Powers concerned. In general, prisoners of war who have been accommodated in a neutral country, and who belong to the following categories, should be repatriated:

(1) Those whose state of health has deteriorated so as to fulfil the conditions laid down for direct repatriation;

(2) Those whose mental or physical powers remain, even after treatment, considerably impaired.

If no special agreements are concluded between the Parties to the conflict concerned, to determine the cases of disablement or sickness entailing direct repatriation or accommodation in a neutral country, such cases shall be settled in accordance with the principles laid down in the Model Agreement concerning direct repatriation and accommodation in neutral countries of wounded and sick prisoners of war and in the Regulations concerning Mixed Medical Commissions annexed to the present Convention.

Post, p. 3432.

Post, p. 3442.

ARTICLE 111

The Detaining Power, the Power on which the prisoners of war depend, and a neutral Power agreed upon by these two Powers, shall endeavour to conclude agreements which will enable prisoners of war to be interned in the territory of the said neutral Power until the close of hostilities.

ARTICLE 112

Upon the outbreak of hostilities, Mixed Medical Commissions shall be appointed to examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them. The appointment, duties and functioning of these Commissions shall be in conformity with the provisions of the Regulations annexed to the present Convention.

However, prisoners of war who, in the opinion of the medical authorities of the Detaining Power, are manifestly seriously injured or seriously sick, may be repatriated without having to be examined by a Mixed Medical Commission.

ARTICLE 113

Besides those who are designated by the medical authorities of the Detaining Power, wounded or sick prisoners of war belonging to the categories listed below shall be entitled to present themselves for examination by the Mixed Medical Commissions provided for in the foregoing Article:

(1) Wounded and sick proposed by a physician or surgeon who is of the same nationality, or a national of a Party to the conflict allied with the Power on which the said prisoners depend, and who exercises his functions in the camp.

(2) Wounded and sick proposed by their prisoners' representative.

(3) Wounded and sick proposed by the Power on which they depend, or by an organization duly recognized by the said Power and giving assistance to the prisoners.

Prisoners of war who do not belong to one of the three foregoing categories may nevertheless present themselves for examination by Mixed Medical Commissions, but shall be examined only after those belonging to the said categories.

The physician or surgeon of the same nationality as the prisoners who present themselves for examination by the Mixed Medical Commission, likewise the prisoners' representative of the said prisoners, shall have permission to be present at the examination.

ARTICLE 114

Prisoners of war who meet with accidents shall, unless the injury is self-inflicted, have the benefit of the provisions of this Convention as regards repatriation or accommodation in a neutral country.

ARTICLE 115

No prisoner of war on whom a disciplinary punishment has been imposed and who is eligible for repatriation or for accommodation in a neutral country, may be kept back on the plea that he has not undergone his punishment.

Prisoners of war detained in connection with a judicial prosecution or conviction and who are designated for repatriation or accommodation in a neutral country, may benefit by such measures before the end of the proceedings or the completion of the punishment, if the Detaining Power consents.

Parties to the conflict shall communicate to each other the names of those who will be detained until the end of the proceedings or the completion of the punishment.

ARTICLE 116

The cost of repatriating prisoners of war or of transporting them to a neutral country shall be borne, from the frontiers of the Detaining Power, by the Power on which the said prisoners depend.

ARTICLE 117

No repatriated person may be employed on active military service.

SECTION II

RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE CLOSE OF HOSTILITIES

ARTICLE 118

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

The costs of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.

ARTICLE 119

Repatriation shall be effected in conditions similar to those laid down in Articles 46 to 48 inclusive of the present Convention for the transfer of prisoners of war, having regard to the provisions of Article 118 and to those of the following paragraphs.

On repatriation, any articles of value impounded from prisoners of war under

Article 18, and any foreign currency which has not been converted into the currency of the Detaining Power, shall be restored to them. Articles of value and foreign currency which, for any reason whatever, are not restored to prisoners of war on repatriation, shall be despatched to the Information Bureau set up under Article 122.

Prisoners of war shall be allowed to take with them their personal effects, and any correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of repatriation so require, to what each prisoner can reasonably carry. Each prisoner shall in all cases be authorized to carry at least twenty-five kilograms.

The other personal effects of the repatriated prisoner shall be left in the charge of the Detaining Power which shall have them forwarded to him as soon as it has concluded an agreement to this effect, regulating the conditions of transport and the payment of the costs involved, with the Power on which the prisoner depends.

Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence.

Parties to the conflict shall communicate to each other the names of any prisoners of war who are detained until the end of the proceedings or until punishment has been completed.

By agreement between the Parties to the conflict, commissions shall be established for the purpose of searching for dispersed prisoners of war and of assuring their repatriation with the least possible delay.

SECTION III

DEATH OF PRISONERS OF WAR

ARTICLE 120

Wills of prisoners of war shall be drawn up so as to satisfy the conditions of validity required by the legislation of their country of origin, which will take steps to inform the Detaining Power of its requirements in this respect. At the request of the prisoner of war and, in all cases, after death, the will shall be transmitted without delay to the Protecting Power; a certified copy shall be sent to the Central Agency.

Death certificates, in the form annexed to the present Convention, or lists certified by a responsible officer, of all persons who die as prisoners of war shall be forwarded as rapidly as possible to the Prisoner of War Information Bureau established in accordance with Article 122. The death certificates or certified lists shall show particulars of identity as set out in the third paragraph of Article 17, and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the graves.

The burial or cremation of a prisoner of war shall be preceded by a medical examination of the body with a view to confirming death and enabling a report to be made and, where necessary, establishing identity.

The detaining authorities shall ensure that prisoners of war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place.

Deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his express wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased.

In order that graves may always be found, all particulars of burials and graves shall be recorded with a Graves Registration Service established by the Detaining Power. Lists of graves and particulars of the prisoners of war interred in cemeteries and elsewhere shall be transmitted to the Power on which such prisoners of war depended. Responsibility for the care of these graves and for records of any subsequent moves of the bodies shall rest on the Power controlling the territory, if a Party to the present Convention. These provisions shall also apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

ARTICLE 121

Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. Statements shall be taken from witnesses, especially from those who are prisoners of war, and a report including such statements shall be forwarded to the Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible.

PART V

INFORMATION BUREAUX AND RELIEF SOCIETIES FOR PRISONERS OF WAR

ARTICLE 122

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners of war who are in its power. Neutral or non-belligerent Powers who may have received within their territory persons belonging to one of the categories referred to in Article 4, shall take the same action with respect to such persons. The Power concerned shall ensure that the Prisoners of War Information Bureau is provided with the necessary accommodation, equipment and staff to ensure its efficient working. It shall be at liberty to employ prisoners of war in such a Bureau under the conditions laid down in the Section of the present Convention dealing with work by prisoners of war.

Within the shortest possible period, each of the Parties to the conflict shall give its Bureau the information referred to in the fourth, fifth and sixth paragraphs of this Article regarding any enemy person belonging to one of the categories referred to in Article 4, who has fallen into its power. Neutral or non-belligerent Powers shall take the same action with regard to persons belonging to such categories whom they have received within their territory.

The Bureau shall immediately forward such information by the most rapid means to the Powers concerned, through the intermediary of the Protecting Powers and likewise of the Central Agency provided for in Article 123.

This information shall make it possible quickly to advise the next of kin concerned. Subject to the provisions of Article 17, the information shall include, in so far as available to the Information Bureau, in respect of each prisoner of war, his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the Power on which he depends, first name of the father and maiden name of the mother, name and address of the person to be informed and the address to which correspondence for the prisoner may be sent.

The Information Bureau shall receive from the various departments concerned information regarding transfers, releases, repatriations, escapes, admissions to hospital, and deaths, and shall transmit such information in the manner described in the third paragraph above.

Likewise, information regarding the state of health of prisoners of war who are seriously ill or seriously wounded shall be supplied regularly, every week if possible.

The Information Bureau shall also be responsible for replying to all enquiries sent to it concerning prisoners of war, including those who have died in captivity; it will make any enquiries necessary to obtain the information which is asked for if this is not in its possession.

All written communications made by the Bureau shall be authenticated by a signature or a seal.

The Information Bureau shall furthermore be charged with collecting all personal valuables, including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin, left by prisoners of war who have been repatriated or released, or who have escaped or died, and shall forward the said valuables to the Powers concerned. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full particulars of the identity of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Other personal effects of such prisoners of war shall be transmitted under arrangements agreed upon between the Parties to the conflict concerned.

ARTICLE 123

A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency.

The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend. It shall receive from the Parties to the conflict all facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross, or of the relief societies provided for in Article 125.

ARTICLE 124

The national Information Bureaux and the Central Information Agency shall enjoy free postage for mail, likewise all the exemptions provided for in Article 74, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

ARTICLE 125

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all

necessary facilities for visiting the prisoners, for distributing relief supplies and material, from any source, intended for religious, educational or recreative purposes, and for assisting them in organizing their leisure time within the camps. Such societies or organizations may be constituted in the territory of the Detaining Power or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the effective operation of adequate relief to all prisoners of war.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

As soon as relief supplies or material intended for the above-mentioned purposes are handed over to prisoners of war, or very shortly afterwards, receipts for each consignment, signed by the prisoners' representative, shall be forwarded to the relief society or organization making the shipment. At the same time, receipts for these consignments shall be supplied by the administrative authorities responsible for guarding the prisoners.

PART VI

EXECUTION OF THE CONVENTION

SECTION I

GENERAL PROVISIONS

ARTICLE 126

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

The Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.

ARTICLE 127

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

ARTICLE 128

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

ARTICLE 129

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

ARTICLE 130

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

ARTICLE 131

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

ARTICLE 132

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

SECTION II

FINAL PROVISIONS

ARTICLE 133

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

ARTICLE 134

TS 846.
47 Stat. 2021.

The present Convention replaces the Convention of July 27, 1929, in relations between the High Contracting Parties.

ARTICLE 135

In the relations between the Powers which are bound by the Hague Convention respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and which are parties to the present Convention, this last Convention shall be complementary to Chapter II of the Regulations annexed to the above-mentioned Conventions of the Hague.

TS 403, 539. 32 Stat. 1803; 36 Stat. 2277.

ARTICLE 136

The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are parties to the Convention of July 27, 1929.

ARTICLE 137

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

ARTICLE 138

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

ARTICLE 139

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

ARTICLE 140

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

ARTICLE 141

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

ARTICLE 142

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

ARTICLE 143

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

IN WITNESS WHEREOF the undersigned, having deposited their respective full powers, have signed the present Convention.

DONE at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

For AFGHANÍSTAN / Pour l'AFGHANISTAN

M. Osman AMIRI

For the PEOPLE'S REPUBLIC OF ALBANIA / Pour la RÉPUBLIQUE POPULAIRE D'ALBANIE

Avec les réserves aux articles 10, 12 et 85 ci-jointes [1]

J. MALO

For ARGENTINA / Pour l'ARGENTINE

Avec la réserve ci-jointe [2]

Guillermo A. SPERONI

For AUSTRALIA / Pour l'AUSTRALIE

Norman R. MIGHELL

Subject to Ratification [3]

For AUSTRIA / Pour l'AUTRICHE

Dr. Rud. BLUEHDORN

For BELGIUM / Pour la BELGIQUE

Maurice BOURQUIN

For the BYELORUSSIAN SOVIET SOCIALIST REPUBLIC / Pour la RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE

С оговорками по ст. ст. 10, 12, 85.[4]
Текст оговорок прилагается
Глава делегации БССР
И. КУЦЕЙНИКОВ

For BOLIVIA / Pour la BOLIVIE

G. MEDEIROS

For BRAZIL / Pour le BRÉSIL

João PINTO DA SILVA, General Floriano DE LIMA BRAYNER

[1] Voir le texte des réserves à la page 233. [*Post*, p. 3468.]
[2] Voir le texte de la réserve à la page 234. [*Post*, p. 3470.]
[3] When signing, the Australian Plenipotentiary declared that his Government retained the right to enter reservations at the time of ratification.
[4] Voir le texte des réserves à la page 234. [*Post*, p. 3470.]

For the UNITED STATES OF AMERICA
Leland HARRISON,

Pour les ÉTATS-UNIS D'AMÉRIQUE
Raymund T. YINGLING

For ETHIOPIA
Gachaou ZELLEKE

Pour l'ÉTHIOPIE

For FINLAND
Reinhold SVENTO

Pour la FINLANDE

For FRANCE
G. CAHEN-SALVADOR JACQUINOT

Pour la FRANCE

For GREECE
M. PESMAZOGLOU

Pour la GRÈCE

For GUATEMALA
A. DUPONT-WILLEMIN

Pour le GUATEMALA

For the HUNGARIAN PEOPLE'S REPUBLIC

Pour la RÉPUBLIQUE POPULAIRE HONGROISE

Avec les réserves ci-jointes [1]
Anna KARA

For INDIA
D. B. DESAI

Pour l'INDE

For IRAN
A. H. MEYKADEH

Pour l'IRAN

For the REPUBLIC OF IRELAND
Sean MACBRIDE

Pour la RÉPUBLIQUE D'IRLANDE

For ISRAEL
M. KAHANY

Pour ISRAËL

[1] Voir le texte des réserves à la page 239. [*Post*, p. 3480.]

For PERU — Pour le PÉROU

Gonzalo PIZZARO

For the REPUBLIC OF THE PHILIPPINES — Pour la RÉPUBLIQUE DES PHILIPPINES

P. SEBASTIAN [1]

For POLAND — Pour la POLOGNE

Avec les réserves ci-jointes [2]

Julian PRZYBOS

For PORTUGAL — Pour le PORTUGAL

Avec les réserves ci-jointes [3]

G. CALDEIRA COELHO

For the RUMANIAN PEOPLE'S REPUBLIC — Pour la RÉPUBLIQUE POPULAIRE ROUMAINE

Avec les réserves ci-jointes [4]

I. DRAGOMIR

For the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND — Pour le ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

Robert CRAIGIE — H. A. STRUTT — W. H. GARDNER

For the HOLY SEE — Pour le SAINT-SIÈGE

Philippe BERNARDINI

For EL SALVADOR — Pour EL SALVADOR

R. A. BUSTAMANTE

For SWEDEN — Pour la SUÈDE

Sous réserve de ratification par S. M. le Roi de Suède avec l'approbation du Riksdag

Staffan SÖDERBLOM

For SWITZERLAND — Pour la SUISSE

Max PETITPIERRE — Plinio BOLLA

Colonel div. DU PASQUIER — Ph. ZUTTER

H. MEULI

[1] "This signature is subject to ratification by the Philippines Senate in accordance with the provisions of their Constitution".

[2] Voir le texte des réserves à la page 244. [*Post*, p. 3490.]

[3] Voir le texte des réserves à la page 246. [*Post*, p. 3494.]

[4] Voir le texte des réserves à la page 247. [*Post*, p. 3496.]

ANNEX I

MODEL AGREEMENT CONCERNING DIRECT REPATRIATION AND ACCOMMODATION IN NEUTRAL COUNTRIES OF WOUNDED AND SICK PRISONERS OF WAR

(see Article 110)

I. — PRINCIPLES FOR DIRECT REPATRIATION AND ACCOMMODATION IN NEUTRAL COUNTRIES

A. Direct Repatriation

The following shall be repatriated direct:

(1) All prisoners of war suffering from the following disabilities as the result of trauma: loss of a limb, paralysis, articular or other disabilities, when this disability is at least the loss of a hand or a foot, or the equivalent of the loss of a hand or a foot.

Without prejudice to a more generous interpretation, the following shall be considered as equivalent to the loss of a hand or a foot:

(a) Loss of a hand or of all the fingers, or of the thumb and forefinger of one hand; loss of a foot, or of all the toes and metatarsals of one foot.

(b) Ankylosis, loss of osseous tissue, cicatricial contracture preventing the functioning of one of the large articulations or of all the digital joints of one hand.

(c) Pseudarthrosis of the long bones.

(d) Deformities due to fracture or other injury which seriously interfere with function and weight-bearing power.

(2) All wounded prisoners of war whose condition has become chronic, to the extent that prognosis appears to exclude recovery—in spite of treatment—within one year from the date of the injury, as, for example, in case of:

(a) Projectile in the heart, even if the Mixed Medical Commission should fail, at the time of their examination, to detect any serious disorders.

(b) Metallic splinter in the brain or the lungs, even if the Mixed Medical Commission cannot, at the time of examination, detect any local or general reaction.

(c) Osteomyelitis, when recovery cannot be foreseen in the course of the year following the injury, and which seems likely to result in ankylosis of a joint, or other impairments equivalent to the loss of a hand or a foot.

(d) Perforating and suppurating injury to the large joints.

(e) Injury to the skull, with loss or shifting of bony tissue.

(f) Injury or burning of the face with loss of tissue and functional lesions.

(g) Injury to the spinal cord.

(h) Lesion of the peripheral nerves, the sequelae of which are equivalent to the loss of a hand or foot, and the cure of which requires more than a year from the date of injury, for example: injury to the brachial or lumbosacral plexus median or sciatic nerves, likewise combined injury to the radial and cubital nerves or to the lateral popliteal nerve (N. peroneous communis) and medial popliteal nerve (N. tibialis); etc. The separate injury of the radial (musculospiral), cubital, lateral or medial popliteal nerves shall not, however, warrant repatriation except in case of contractures or of serious neurotrophic disturbance.

(i) Injury to the urinary system, with incapacitating results.

(3) All sick prisoners of war whose condition has become chronic to the extent that prognosis seems to exclude recovery—in spite of treatment—within one year from the inception of the disease, as, for example, in case of:

(a) Progressive tuberculosis of any organ which, according to medical prognosis, cannot be cured or at least considerably improved by treatment in a neutral country.

(b) Exudate pleurisy.

(c) Serious diseases of the respiratory organs of non-tubercular etiology, presumed incurable, for example: serious pulmonary emphysema, with or without bronchitis; chronic asthma *; chronic bronchitis * lasting more than one year in captivity; bronchiectasis *; etc.

(d) Serious chronic affections of the circulatory system, for example: valvular lesions and myocarditis *, which have shown signs of circulatory failure during captivity, even though the Mixed Medical Commission cannot detect any such signs at the time of examination; affections of the pericardium and the vessels (Buerger's disease, aneurisms of the large vessels); etc.

(e) Serious chronic affections of the digestive organs, for example: gastric or duodenal ulcer; sequelae of gastric operations performed in captivity; chronic gastritis, enteritis or colitis, having lasted more than one year and seriously affecting the general condition; cirrhosis of the liver; chronic cholecystopathy *; etc.

(f) Serious chronic affections of the genito-urinary organs, for example: chronic diseases of the kidney with consequent disorders; nephrectomy because of a tubercular kidney; chronic pyelitis or chronic cystitis; hydronephrosis or pyonephrosis; chronic grave gynaecological conditions; normal pregnancy and obstetrical disorder, where it is impossible to accommodate in a neutral country; etc.

* The decision of the Mixed Medical Commission shall be based to a great extent on the records kept by camp physicians and surgeons of the same nationality as the prisoners of war, or on an examination by medical specialists of the Detaining Power.

(g) Serious chronic diseases of the central and peripheral nervous system, for example: all obvious psychoses and psychoneuroses, such as serious hysteria, serious captivity psychoneurosis, etc., duly verified by a specialist *; any epilepsy duly verified by the camp physician *; cerebral arteriosclerosis; chronic neuritis lasting more than one year; etc.

(h) Serious chronic diseases of the neuro-vegetative system, with considerable diminution of mental or physical fitness, noticeable loss of weight and general asthenia.

(i) Blindness of both eyes, or of one eye when the vision of the other is less than 1 in spite of the use of corrective glasses; diminution of visual acuity in cases where it is impossible to restore it by correction to an acuity of ½ in at least one eye *; other grave ocular affections, for example: glaucoma, iritis, choroiditis; trachoma; etc.

(k) Auditive disorders, such as total unilateral deafness, if the other ear does not discern the ordinary spoken word at a distance of one metre *; etc.

(l) Serious affections of metabolism, for example: diabetes mellitus requiring insulin treatment; etc.

(m) Serious disorders of the endocrine glands, for example: thyrotoxicosis; hypothyrosis; Addison's disease; Simmonds' cachexia; tetany; etc.

(n) Grave and chronic disorders of the blood-forming organs.

(o) Serious cases of chronic intoxication, for example: lead poisoning, mercury poisoning, morphinism, cocainism, alcoholism; gas or radiation poisoning; etc.

(p) Chronic affections of locomotion, with obvious functional disorders, for example: arthritis deformans; primary and secondary progressive chronic polyarthritis; rheumatism with serious clinical symptoms; etc.

(q) Serious chronic skin diseases, not amenable to treatment.

(r) Any malignant growth.

(s) Serious chronic infectious diseases, persisting for one year after their inception, for example: malaria with decided organic impairment, amœbic or bacillary dysentery with grave disorders; tertiary visceral syphilis resistant to treatment; leprosy; etc.

(t) Serious avitaminosis or serious inanition.

B. Accommodation in neutral countries

The following shall be eligible for accommodation in a neutral country:

(1) All wounded prisoners of war who are not likely to recover in captivity, but who might be cured or whose condition might be considerably improved by accommodation in a neutral country.

* The decision of the Mixed Medical Commission shall be based to a great extent on the records kept by camp physicians and surgeons of the same nationality as the prisoners of war, or on an examination by medical specialists of the Detaining Power.

(2) Prisoners of war suffering from any form of tuberculosis, of whatever organ, and whose treatment in a neutral country would be likely to lead to recovery or at least to considerable improvement, with the exception of primary tuberculosis cured before captivity.

(3) Prisoners of war suffering from affections requiring treatment of the respiratory, circulatory, digestive, nervous, sensory, genito-urinary, cutaneous, locomotive organs, etc., if such treatment would clearly have better results in a neutral country than in captivity.

(4) Prisoners of war who have undergone a nephrectomy in captivity for a non-tubercular renal affection; cases of osteomyelitis, on the way to recovery or latent; diabetes mellitus not requiring insulin treatment; etc.

(5) Prisoners of war suffering from war or captivity neuroses.

Cases of captivity neurosis which are not cured after three months of accommodation in a neutral country, or which after that length of time are not clearly on the way to complete cure, shall be repatriated.

(6) All prisoners of war suffering from chronic intoxication (gases, metals, alkaloids, etc.), for whom the prospects of cure in a neutral country are especially favourable.

(7) All women prisoners of war who are pregnant or mothers with infants and small children.

The following cases shall not be eligible for accommodation in a neutral country:

(1) All duly verified chronic psychoses.

(2) All organic or functional nervous affections considered to be incurable.

(3) All contagious diseases during the period in which they are transmissible, with the exception of tuberculosis.

II. — GENERAL OBSERVATIONS

(1) The conditions given shall, in a general way, be interpreted and applied in as broad a spirit as possible.

Neuropathic and psychopathic conditions caused by war or captivity, as well as cases of tuberculosis in all stages, shall above all benefit by such liberal interpretation. Prisoners of war who have sustained several wounds, none of which, considered by itself, justifies repatriation, shall be examined in the same spirit, with due regard for the psychic traumatism due to the number of their wounds.

(2) All unquestionable cases giving the right to direct repatriation (amputation, total blindness or deafness, open pulmonary tuberculosis, mental disorder, malignant growth, etc.) shall be examined and repatriated as soon as possible by the camp physicians or by military medical commissions appointed by the Detaining Power.

(3) Injuries and diseases which existed before the war and which have not become worse, as well as war injuries which have not prevented subsequent military service, shall not entitle to direct repatriation.

(4) The provisions of this Annex shall be interpreted and applied in a similar manner in all countries party to the conflict. The Powers and authorities concerned shall grant to Mixed Medical Commissions all the facilities necessary for the accomplishment of their task.

(5) The examples quoted under (I) above represent only typical cases. Cases which do not correspond exactly to these provisions shall be judged in the spirit of the provisions of Article 110 of the present Convention, and of the principles embodied in the present Agreement.

ANNEX II

REGULATIONS CONCERNING MIXED MEDICAL COMMISSIONS

(see Article 112)

ARTICLE 1

The Mixed Medical Commissions provided for in Article 112 of the Convention shall be composed of three members, two of whom shall belong to a neutral country, the third being appointed by the Detaining Power. One of the neutral members shall take the chair.

ARTICLE 2

The two neutral members shall be appointed by the International Committee of the Red Cross, acting in agreement with the Protecting Power, at the request of the Detaining Power. They may be domiciled either in their country of origin, in any other neutral country, or in the territory of the Detaining Power.

ARTICLE 3

The neutral members shall be approved by the Parties to the conflict concerned, who shall notify their approval to the International Committee of the Red Cross and to the Protecting Power. Upon such notification, the neutral members shall be considered as effectively appointed.

ARTICLE 4

Deputy members shall also be appointed in sufficient number to replace the regular members in case of need. They shall be appointed at the same time as the regular members or, at least, as soon as possible.

ARTICLE 5

If for any reason the International Committee of the Red Cross cannot arrange for the appointment of the neutral members, this shall be done by the Power protecting the interests of the prisoners of war to be examined.

ARTICLE 6

So far as possible, one of the two neutral members shall be a surgeon and the other a physician.

ARTICLE 7

The neutral members shall be entirely independent of the Parties to the conflict, which shall grant them all facilities in the accomplishment of their duties.

ARTICLE 8

By agreement with the Detaining Power, the International Committee of the Red Cross, when making the appointments provided for in Articles 2 and 4 of the present Regulations, shall settle the terms of service of the nominees.

ARTICLE 9

The Mixed Medical Commissions shall begin their work as soon as possible after the neutral members have been approved, and in any case within a period of three months from the date of such approval.

ARTICLE 10

The Mixed Medical Commissions shall examine all the prisoners designated in Article 113 of the Convention. They shall propose repatriation, rejection, or reference to a later examination. Their decisions shall be made by a majority vote.

ARTICLE 11

The decisions made by the Mixed Medical Commissions in each specific case shall be communicated, during the month following their visit, to the Detaining Power, the Protecting Power and the International Committee of the Red Cross. The Mixed Medical Commissions shall also inform each prisoner of war examined of the decision made, and shall issue to those whose repatriation has been proposed, certificates similar to the model appended to the present Convention.

ARTICLE 12

The Detaining Power shall be required to carry out the decisions of the Mixed Medical Commissions within three months of the time when it receives due notification of such decisions.

ARTICLE 13

If there is no neutral physician in a country where the services of a Mixed Medical Commission seem to be required, and if it is for any reason impossible to appoint

neutral doctors who are resident in another country, the Detaining Power, acting in agreement with the Protecting Power, shall set up a Medical Commission which shall undertake the same duties as a Mixed Medical Commission, subject to the provisions of Articles 1, 2, 3, 4, 5 and 8 of the present Regulations.

ARTICLE 14

Mixed Medical Commissions shall function permanently and shall visit each camp at intervals of not more than six months.

ANNEX III

REGULATIONS CONCERNING COLLECTIVE RELIEF

(see Article 73)

ARTICLE 1

Prisoners' representatives shall be allowed to distribute collective relief shipments for which they are responsible, to all prisoners of war administered by their camp, including those who are in hospitals, or in prisons or other penal establishments.

ARTICLE 2

The distribution of collective relief shipments shall be effected in accordance with the instructions of the donors and with a plan drawn up by the prisoners' representatives. The issue of medical stores shall, however, be made for preference in agreement with the senior medical officers, and the latter may, in hospitals and infirmaries, waive the said instructions, if the needs of their patients so demand. Within the limits thus defined, the distribution shall always be carried out equitably.

ARTICLE 3

The said prisoners' representatives or their assistants shall be allowed to go to the points of arrival of relief supplies near their camps, so as to enable the prisoners' representatives or their assistants to verify the quality as well as the quantity of the goods received, and to make out detailed reports thereon for the donors.

ARTICLE 4

Prisoners' representatives shall be given the facilities necessary for verifying whether the distribution of collective relief in all subdivisions and annexes of their camps has been carried out in accordance with their instructions.

ARTICLE 5

Prisoners' representatives shall be allowed to fill up, and cause to be filled up by the prisoners' representatives of labour detachments or by the senior medical officers of infirmaries and hospitals, forms or questionnaires intended for the donors, relating to collective relief supplies (distribution, requirements, quantities, etc.). Such forms and questionnaires, duly completed, shall be forwarded to the donors without delay.

ARTICLE 6

In order to secure the regular issue of collective relief to the prisoners of war in their camp, and to meet any needs that may arise from the arrival of new contingents of prisoners, prisoners' representatives shall be allowed to build up and maintain adequate reserve stocks of collective relief. For this purpose, they shall have suitable warehouses at their disposal; each warehouse shall be provided with two locks, the prisoners' representative holding the keys of one lock and the camp commander the keys of the other.

ARTICLE 7

When collective consignments of clothing are available, each prisoner of war shall retain in his possession at least one complete set of clothes. If a prisoner has more than one set of clothes, the prisoners' representative shall be permitted to withdraw excess clothing from those with the largest number of sets, or particular articles in excess of one, if this is necessary in order to supply prisoners who are less well provided. He shall not, however, withdraw second sets of underclothing, socks or footwear, unless this is the only means of providing for prisoners of war with none.

ARTICLE 8

The High Contracting Parties, and the Detaining Powers in particular, shall authorize, as far as possible and subject to the regulations governing the supply of the population, all purchases of goods made in their territories for the distribution of collective relief to prisoners of war. They shall similarly facilitate the transfer of funds and other financial measures of a technical or administrative nature taken for the purpose of making such purchases.

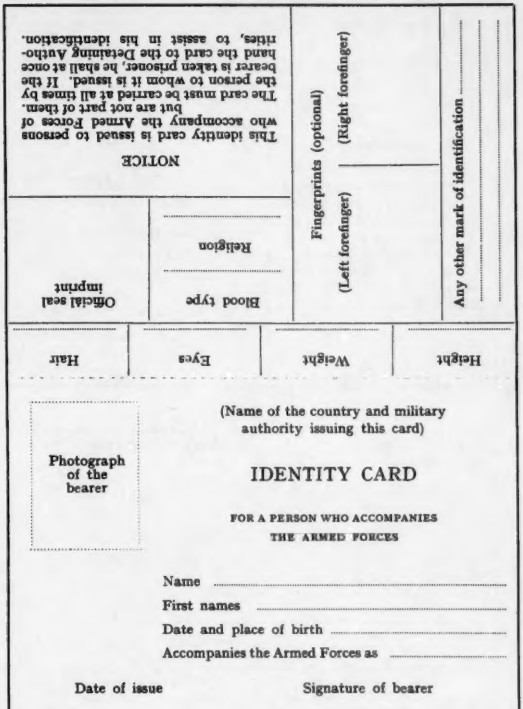
ARTICLE 9

The foregoing provisions shall not constitute an obstacle to the right of prisoners of war to receive collective relief before their arrival in a camp or in the course of transfer, nor to the possibility of representatives of the Protecting Power, the International Committee of the Red Cross, or any other body giving assistance to prisoners which may be responsible for the forwarding of such supplies, ensuring the distribution thereof to the addressees by any other means that they may deem useful.

ANNEX IV

A. IDENTITY CARD

(see Article 4)


Height
Weight
Eyes
Hair
Photograph of the bearer
(Name of the country and military authority issuing this card)
IDENTITY CARD
FOR A PERSON WHO ACCOMPANIES THE ARMED FORCES
Name
First names
Date and place of birth
Accompanies the Armed Forces as
Date of issue
Signature of bearer
Blood type
Official seal imprint
Religion
Fingerprints (optional)
(Left forefinger)
(Right forefinger)
Any other mark of identification
NOTICE
This identity card is issued to persons who accompany the Armed Forces of but are not part of them.
The card must be carried at all times by the person to whom it is issued. If the bearer is taken prisoner, he shall at once hand the card to the Detaining Authorities, to assist in his identification.

Remarks. — This card should be made out for preference in two or three languages, one of which is in international use. Actual size of the card: 13 by 10 centimetres. It should be folded along the dotted line.

ANNEX IV

B. CAPTURE CARD

(see Article 70)

1. Front

PRISONER OF WAR MAIL — Postage free

CAPTURE CARD FOR PRISONER OF WAR

IMPORTANT

This card must be completed by each prisoner immediately after being taken prisoner and each time his address is changed (by reason of transfer to a hospital or to another camp).

This card is distinct from the special card which each prisoner is allowed to send to his relatives.

CENTRAL PRISONERS OF WAR AGENCY

INTERNATIONAL COMMITTEE OF THE RED CROSS

GENEVA
SWITZERLAND

2. Reverse side

Write legibly and in block letters

1. Power on which the prisoner depends .....

2. Name 3. First names (in full) 4. First name of father

.....

5. Date of birth ..... 6. Place of birth .....

7. Rank .....

8. Service number .....

9. Address of next of kin .....

*10. Taken prisoner on: (or)
Coming from (Camp No., hospital, etc.) .....

*11. *(a)* Good health—*(b)* Not wounded—*(c)* Recovered—*(d)* Convalescent—*(e)* Sick—*(f)* Slightly wounded—*(g)* Seriously wounded.

12. My present address is: Prisoner No. .....

Name of camp .....

13. Date ..... 14. Signature .....

* Strike out what is not applicable—Do not add any remarks—See explanations overleaf.

Remarks.—This form should be made out in two or three languages, particularly in the prisoner's own language and in that of the Detaining Power. Actual size: 15 by 10.5 centimetres.

ANNEX IV

C. CORRESPONDENCE CARD AND LETTER

(see Article 71)

I. CARD.

1. Front

PRISONER OF WAR MAIL

Postage free

POST CARD

To .....

Sender:
Name and first names .....

Place and date of birth .....

Prisoner of War No. .....

Name of camp .....

Country where posted .....

Place of Destination .....

Street .....

Country .....

Province or Department .....

2. Reverse side

NAME OF CAMP ..... Date .....

.....

.....

.....

.....

.....

.....

.....

.....

Write on the dotted lines only and as legibly as possible.

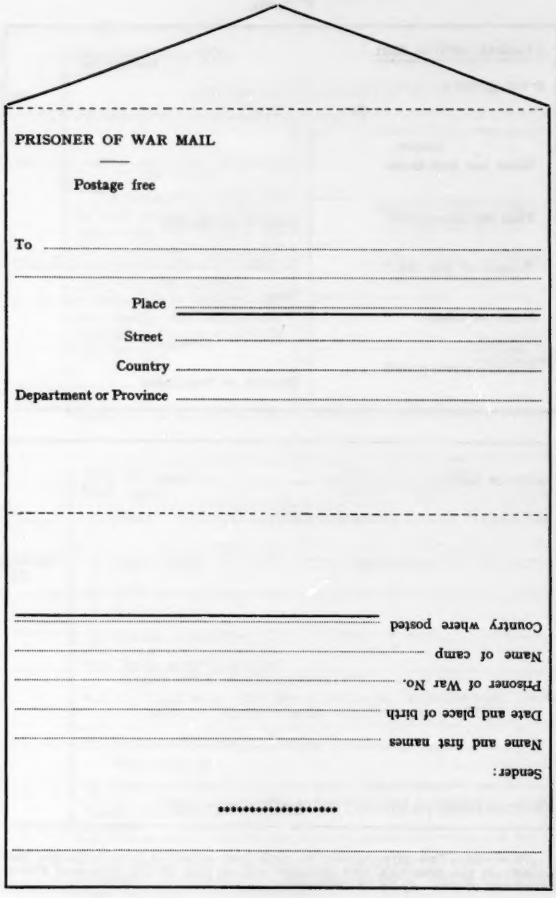
Remarks.—This form should be made out in two or three languages, particularly in the prisoner's own language and in that of the Detaining Power. Actual size of form: 15 by 10 centimetres.

ANNEX IV

C. CORRESPONDENCE CARD AND LETTER

(see Article 71)

2. LETTER



Remarks.—This form should be made out in two or three languages, particularly in the prisoner's own language and in that of the Detaining Power. It should be folded along the dotted line, the tab being inserted in the slit (marked by a line of asterisks); it then has the appearance of an envelope. Overleaf, it is lined like the postcard above *(Annex IV C 1)*; this space can contain about 250 words which the prisoner is free to write. Actual size of the folded form: 29 by 15 centimetres.

ANNEX IV

D. NOTIFICATION OF DEATH

(see Article 120)

(Title of responsible authority)

NOTIFICATION OF DEATH

Power on which the prisoner depended .....

Name and first names .....

First name of father	.....
Place and date of birth	.....
Place and date of death	.....
Rank and service number (as given on identity disc)	.....
Address of next of kin	.....
Where and when taken prisoner	.....
Cause and circumstances of death	.....
Place of burial	.....
Is the grave marked and can it be found later by the relatives?	.....
Are the personal effects of the deceased in the keeping of the Detaining Power or are they being forwarded together with this notification?	.....
If forwarded, through what agency?	.....
Can the person who cared for the deceased during sickness or during his last moments (doctor, nurse, minister of religion, fellow prisoner) give here or on an attached sheet a short account of the circumstances of the death and burial?	.....

(Date, seal and signature of responsible authority.)

.....

Signature and address of two witnesses

.....

Remarks.—This form should be made out in two or three languages, particularly in the prisoner's own language and in that of the Detaining Power. Actual size of the form: 21 by 30 centimetres.

ANNEX IV

E. REPATRIATION CERTIFICATE

(see Annex II, Article 11)

REPATRIATION CERTIFICATE

Date:

Camp:

Hospital:

Surname:

First names:

Date of birth:

Rank:

Army Number:

P. W. Number:

Injury Disease:

Decision of the Commission:

Chairman of the
Mixed Medical Commission

A = direct repatriation
B = accommodation in a neutral country
NC = re-examination by next Commission

ANNEX V

MODEL REGULATIONS CONCERNING PAYMENTS SENT BY PRISONERS TO THEIR OWN COUNTRY

(see Article 63)

(1) The notification referred to in the third paragraph of Article 63 will show:

(a) number as specified in Article 17, rank, surname and first names of the prisoner of war who is the payer;

(b) the name and address of the payee in the country of origin;

(c) the amount to be so paid in the currency of the country in which he is detained.

(2) The notification will be signed by the prisoner of war, or his witnessed mark made upon it if he cannot write, and shall be countersigned by the prisoners' representative.

(3) The camp commander will add to this notification a certificate that the prisoner of war concerned has a credit balance of not less than the amount registered as payable.

(4) The notification may be made up in lists, each sheet of such lists being witnessed by the prisoners' representative and certified by the camp commander.

APPENDIX B

PARTIES TO THE 1949 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR AS OF 1 JUNE 1977[1]

State	Date of Deposit[2]	U.N.T.S.[3]	Reservation[4]
Afghanistan	26 September 1956	253:339	
Albania	27 May 1957	270:376	10, 12, 85
Algeria[5]	3 July 1962		
Angola			
Argentina	18 September 1956	251:374	
Australia	14 October 1958	314:332	
Austria	27 August 1953	173:399	
Bahamas	11 July 1975	16 I.R.R.C. 23	
Bahrain	30 November 1971	11 I.R.R.C. 27	
Bangladesh	4 April 1972	12 I.R.R.C. 333	
Barbados	10 September 1968	653:454	
Belgium	3 September 1952	139:461	
Benin[6]	14 December 1961	423:302	
Bhutan			
Bolivia	10 December 1976	17 I.R.R.C. 263	
Botswana	29 March 1968	637:386	
Brazil	29 June 1957	274:339	
Bulgaria	22 July 1954	198:388	10, 12, 85
Burma			
Burundi	27 December 1971	12 I.R.R.C. 95	
Byelorussian S.S.R.	3 August 1954	198:388	10, 12, 85
Cambodia[7]	8 December 1958	320:336	
Cameroon	16 September 1963	480:324	
Canada	14 May 1965	538:332	
Cape Verde			
Cent. African Rep.	23 July 1966	573:304	
Chad	5 August 1970	10 I.R.R.C. 557	
Chile	12 October 1950	78:367	
China, People's Rep.	28 December 1956	260:442	10, 12, 85
China, Rep. of			
Colombia	8 November 1961	421:296	
Comoros			
Congo	30 January 1967	600:328	
Costa Rica	15 October 1969	703:460	
Cuba	15 April 1954	191:367	
Cyprus	23 May 1962	445:316	
Czechoslovakia	19 December 1950	78:367	10, 12, 85
Denmark	27 June 1951	96:325	
Dominican Rep.	22 January 1958	286:339	
Ecuador	11 August 1954	198:389	

State	Date of Deposit[2]	U.N.T.S.[3]	Reservation[4]
Egypt	10 November 1952	150:371	
El Salvador	17 June 1953	167:297	
Equatorial Guinea			
Ethiopia	2 October 1969	703:460	
Fiji	9 August 1971	797:388	
Finland	22 February 1955	207:346	
France	28 June 1951	96:325	
Gabon	20 February 1965	535:408	
Gambia	20 October 1966	632:290	
German Dem. Rep.	30 November 1956	257:368	10, 12, 85
Germany, Fed. Rep.	3 September 1954	199:331	
Ghana	2 August 1958	310:338	
Greece	5 June 1956	247:390	
Grenada			
Guatamala	14 May 1952	131:333	
Guinea			
Guinea-Bissau	21 February 1974	14 I.R.R.C. 191	4, 10
Guyana	22 July 1968	645:344	
Haiti	11 April 1957	267:373	
Holy See	22 February 1951	84:415	
Honduras	30 December 1965	562:324	
Hungary	3 August 1954	198:388	10, 12, 85
Iceland	10 August 1965	547:314	
India	9 November 1950	78:367	
Indonesia	30 September 1958	314:332	
Iran	20 February 1957	264:335	
Iraq	14 February 1956	230:433	
Ireland	27 September 1962	445:316	
Israel	6 July 1951	96:325	
Italy	17 December 1951	120:299	
Ivory Coast	28 December 1961	423:302	
Jamaica	17 July 1964	511:266	
Japan	21 April 1953	165:328	
Jordan	29 May 1951	91:380	
Kenya	20 September 1966	632:290	
Korea, Dem. People's Rep.	27 August 1957	278:261	10, 12, 85
Korea, Rep. of	16 August 1966	575:284	
Kuwait	2 September 1967	608:354	
Laos[8]	29 October 1956	253:339	
Lebanon	10 April 1951	87:395	
Lesotho	18 June 1968	639:328	
Liberia	29 March 1954	188:370	
Libya	22 May 1956	247:390	
Liechtenstein	21 September 1950	75:135	
Luxembourg	1 July 1953	171:417	
Malagasy Rep.	13 July 1963	478:418	
Malawi	5 January 1968	632:290	
Malaysia	24 August 1962	445:316	
Maldives			
Mali	24 May 1965	540:332	
Malta	22 August 1968	653:454	
Mauritania	27 October 1962	445:316	

State	Date of Deposit[2]	U.N.T.S.[3]	Reservation[4]
Mauritius	18 August 1970	10 I.R.R.C. 557	
Mexico	29 October 1952	149:410	
Monaco	5 July 1950	75:135	
Mongolia	20 December 1958	320:336	
Morocco	26 July 1956	248:364	
Mozambique			
Nepal	7 February 1964	492:344	
Netherlands	3 August 1954	198:388	
New Zealand	2 May 1959	330:356	
Nicaragua	17 December 1953	184:339	
Niger	16 April 1964	502:367	
Nigeria	20 June 1961	404:324	
Norway	3 August 1951	100:294	
Oman	31 January 1974	14 I.R.R.C. 191	
Pakistan	12 June 1951	96:325	
Panama	10 February 1956	230:433	
Papua New Guinea	26 May 1976	16 I.R.R.C. 349	
Paraguay	23 October 1961	421:296	
Peru	15 February 1956	230:433	
Philippines	6 October 1952	141:384	
Poland	26 November 1954	202:332	10, 12, 85
Portugal	14 March 1961	394:257	10
Qatar	15 October 1975	16 I.R.R.C. 69	
Romania	1 June 1954	191:367	10, 12, 85
Rwanda	21 March 1964	502:367	
San Marino	28 August 1953	173:399	
São Tomé and Principe	21 May 1976	16 I.R.R.C. 349	
Saudi Arabia	18 May 1963	470:378	
Senegal	23 April 1963	470:378	
Sierra Leone	31 May 1965	544:286	
Singapore	27 April 1973	13 I.R.R.C. 301	
Somalia	12 July 1962	478:418	
South Africa	31 March 1952	128:308	
Spain	4 August 1952	139:461	99
Sri Lanka[9]	28 February 1959	328:307	
Sudan	23 September 1957	278:261	
Surinam	25 November 1975	16 I.R.R.C. 623	
Swaziland	28 June 1973	13 I.R.R.C. 456	
Sweden	28 December 1953	184:339	
Switzerland[2]	31 March 1950	75:135	
Syria	2 November 1953	180:303	
Tanzania[10]	12December 1962	470:378	
Thailand	29 December 1954	202:332	
Togo	6 January 1962	423:302	
Trinidad and Tobago	24 September 1963	480:324	
Tunisia	4 May 1957	269:285	
Turkey	10 February 1954	186:316	
Uganda	18 May 1964	503:330	
Ukrainian S.S.R.	3 August 1954	198:389	10, 12, 85
U.S.S.R.	10 May 1954	191:367	10, 12, 85
United Arab Emirates	10 May 1972	12 I.R.R.C. 399	
United Kingdom	23 September 1957	278:261	

State	Date of Deposit[2]	U.N.T.S.[3]	Reservation[4]
United States	2 August 1955	213:383	
Upper Volta	7 November 1961	421:296	
Uruguay	5 March 1969	676:370	87, 100, 101
Venezuela	13 February 1956	230:433	
Vietnam, Dem. Rep.[11]	28 June 1957	274:339	10, 12, 85
Vietnam, Prov. Rev.[11]	3 December 1973	14 I.R.R.C. 135	4, 10, 12, 85
Vietnam, Rep. of[11]	14 November 1953	181:351	
Vietnam, Soc. Rep of[11]	4 July 1976	16 I.R.R.C. 623	4, 10, 12, 85
Yemen (Aden)	25 May 1977	17 I.R.R.C. 393	
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Yugoslavia[2]	21 April 1950	75:125	10, 12
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Zambia	19 October 1966	632:290	

NOTES TO APPENDIX B

[1] This Appendix is based largely upon information kindly furnished by the Swiss Federal Political Department. All known members of the international community are listed, whether or not they have become Parties.

[2] This column indicates the date upon which the ratification, accession, declaration of continuity, etc., was received by the Swiss Government, designated as the depositary in Article 137 of the Convention. Under the provisions of Articles 138 and 139 the Convention became effective as between Switzerland and Yugoslavia, the first two Parties, on 21 October 1950, and as to all other Parties six months after the date of deposit. (In a few cases declarations of continuity, received by the Swiss Government on the date indicated, are declared to be retroactive to the date of independence.)

[3] Where no citation to the United Nations Treaty Series is presently available, the notices that have appeared in the *International Review of the Red Cross*, the English-language periodical of the International Committee of the Red Cross, have been used.

[4] The numbers appearing in this column indicate the articles of the Convention to which reservations were made at the time of deposit.

[5] According to Bedjaoui, *Law and the Algerian Revolution* 183 and 217, the Provisional Government of Algeria acceded to the Convention on 20 June 1960. The Swiss Federal Political Department gives 3 July 1962 as the date of accession. Neither action by Algeria is included in the United Nations Treaty Series.

[6] Formerly known as Dahomey.

[7] Formerly known as Khmer Republic and now having the official, but little known, title of Democratic Kampuchea.

[8] Laos is now officially known as Lao People's Democratic Republic.

[9] Formerly known as Ceylon.

[10] Tanganyika deposited a declaration of continuity on 12 December 1962. Zanzibar was also covered by the British ratification. It took no action on the Convention prior to merging with Tanganyika to form the United Republic of Tanzania.

[11] The Republic of Vietnam no longer exists. Its successor, the Provisional Revolutionary Government of the Republic of Vietnam filed a new adhesion. The Democratic Republic of Vietnam and the Provisional Revolutionary Government of Vietnam have now merged under the title Socialist Republic of Vietnam which has advised the Swiss Federal Council that it is bound by the Convention subject to the reservations made by its two predecessors.

[12] Formerly known as Congo (Kinshasha).

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